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In The
Supreme Court of the United States

THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC. (d/b/a Ken's Gold Club), a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS, individually; THE 822 CORPORATION; and 421 CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, Pages 1a-179a

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QUESTIONS PRESENTED

(1) Does a final judgment confirming a plaintiff's status as a "prevailing party" for purposes of 42 U.S.C. § 1988, followed by a United States Supreme Court decision in another case that invalidates the theory on which the plaintiff prevailed, qualify as "special circumstances" that render the attorneys' fees award unjust?

(2) Did the United States Supreme Court's decision in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), invalidate the theory on which Respondents prevailed on the merits?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below are as indicated in the caption of this petition. Because Petitioner is a governmental entity, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

The Metropolitan Government of Nashville and Davidson County, Tennessee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 421 F.3d 417. (App. 1a-16a.) The Sixth Circuit's order denying rehearing and rehearing *en banc* is unreported. (App. 201a-202a.) The district court's opinions and orders (App. 18a, 76a, 77a-78a) as well as the Reports and Recommendations of the Magistrate Judge (App. 19a-27a, 79a-106a) are unreported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Sixth Circuit was entered on August 31, 2005. (App. 1a-16a, 17a.) A petition for rehearing and rehearing *en banc* was denied on December 16, 2005. (App. 201a-202a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents initiated this action against Petitioner as a civil rights claim for damages under 42 U.S.C. § 1983 and were later awarded attorneys' fees pursuant to 42 U.S.C. § 1988. Specifically, Respondents challenged the

constitutionality of Chapter 6.54 of the Metropolitan Code of Laws as having violated their First and Fourteenth Amendment rights under the United States Constitution. The Appendix reproduces the version of Chapter 6.54 applicable to this case as well as the First Amendment and Fourteenth Amendment. The 1997, 1998, and 2002 versions of T.C.A. § 27-9-111, the Tennessee writ of certiorari statute, are also included.

STATEMENT OF THE CASE

1. Preliminary Proceedings

On August 19, 1997, the Council of the Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code of Laws, Bill No. 097-796 ("Chapter 6.54"). Among other things, the ordinance required adult-oriented businesses to obtain a license to operate and required entertainers who perform in those businesses to obtain a permit. It imposed a regulatory scheme upon adult-oriented businesses designed to address the deleterious secondary effects of those businesses.

Respondents are owners and operators of adult businesses, including cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, as well as individual entertainers who perform at such establishments. On October 17, 1997, Respondents filed an action under 42 U.S.C. § 1983 against the Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") and Emmett Turner, the former Chief of Police, in his official capacity, alleging that Chapter 6.54 violated their First

and Fourteenth Amendment rights under the United States Constitution. Respondents sought a preliminary injunction, a permanent injunction, and a declaratory judgment as to the constitutionality of Chapter 6.54. On November 10, 1997, the plaintiffs in a subsequently filed case moved to intervene as plaintiffs in the initial case because they alleged similar constitutional injuries and sought similar relief. The cases were subsequently consolidated.

On December 8, 1997, the United States District Court for the Middle District of Tennessee enjoined the Metropolitan Government from enforcing any of the provisions of Chapter 6.54, holding that the ordinance failed to guarantee prompt judicial review of decisions by the Sexually Oriented Business Licensing Board. (Mem. & Order, App. 180a-181a, 182a-200a.) To remedy the infirmities that the court found, the Metropolitan Council amended Chapter 6.54, and the Tennessee General Assembly adopted 1998 Tennessee Public Acts Chapter 794 (App. 272a-274a), which amended the Tennessee writ of certiorari statute, T.C.A. § 27-9-111. By order entered December 3, 1998, the district court dissolved the injunction. (Mem. & Order, App. 162a-163a, 164a-179a.) Respondents appealed the dissolution of this first injunction to the Sixth Circuit Court of Appeals (Appeal #99-5071).

On December 18, 1998, Respondents filed a second motion for a preliminary injunction, asserting new grounds that they had not asserted in their first motion. A three-day hearing on the motion was held in April of 1999. By order entered October 4, 1999, the district court granted Respondents' second motion for preliminary injunction, finding that the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities

provision, the disclosure provision, and the fee amounts were unconstitutional. (Mem. & Order, App. 109a, 110a-161a.) Because the court found that the offending provisions could not be severed from the ordinance, it enjoined the Metropolitan Government from enforcing Chapter 6.54. (Mem., App. 161a.) By order entered December 23, 1999, the preliminary injunction was made permanent. (App. 107a-108a.) The Metropolitan Government appealed this order, and Respondents cross appealed (Appeals #00-5287, #00-5288).

Shortly after the district court issued its memorandum opinion granting the second preliminary injunction, the Metropolitan Government amended Chapter 6.54 to remedy the four issues raised by the district court in granting injunctive relief. Based on those amendments, the Metropolitan Government filed a motion to vacate or dissolve the injunction in the district court. The district court denied that motion for lack of jurisdiction. The Metropolitan Government appealed that order of the district court (Appeal #00-5881).

All appeals were then consolidated before the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals in *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001) ("*Deja Vu I*"), found the bulk of Respondents' challenges to Chapter 6.54 to be without merit. *Id.* at 387-98. On the other hand, the court enjoined enforcement of the ordinance because it found that Chapter 6.54 did not guarantee "prompt judicial review." *Id.* at 400-03. It also found that the term "sexually oriented" was overbroad but could easily be severed and stricken from the ordinance. *Id.* at 389. This Court then denied certiorari. *Metro. Gov't*

of Nashville and Davidson County v. Deja Vu of Nashville, Inc., 535 U.S. 1073 (2002).

2. District Court Attorneys' Fees Rulings

Pursuant to 42 U.S.C. § 1988, Respondents filed four separate motions for attorneys' fees and costs, which were referred to Magistrate Judge Juliet Griffin. On October 1, 2002, Magistrate Judge Griffin issued a Report and Recommendation recommending that the district court grant in part and deny in part Respondents' first three motions for attorneys' fees. (R&R1, App. 79a-106a.) Respondents and the Metropolitan Government filed objections to the Report and Recommendation. The district court approved the first Report and Recommendation in its entirety on December 6, 2002. (Order on R&R1, App. 77a-78a.) The district court also directed the parties to attempt to agree on an attorneys' fees figure, based upon the rulings contained in the Report and Recommendation. The resulting figure was $431,099.56.

On February 7, 2003, the parties filed a Stipulated Notice of the total amount of attorneys' fees encompassed by the court's rulings on the first three motions for attorneys' fees. The parties entered into the stipulation without waiving any rights to appeal the findings that resulted in the figure.

On September 16, 2003, Magistrate Judge Griffin issued a second Report and Recommendation, in which she recommended that the district court grant Respondents' fourth motion for attorneys' fees in its entirety as well as Respondents' re-filed motion for costs. (R&R2, App. 19a-27a.) In so ruling, Magistrate Judge Griffin recommended

an additional award of $46,870 in attorneys' fees, as well as $58,565.66 in costs.

The Metropolitan Government filed a timely objection to the Report and Recommendation. However, on September 30, 2003, the district court entered an order approving the Report and Recommendation in its entirety. (Order on R&R2, App. 18a; as amended, App. 76a.) That order was a final order. (App. 76a.) The Metropolitan Government filed a timely notice of appeal to the Sixth Circuit Court of Appeals.

3. Sixth Circuit Court of Appeals Decision

In a 2-1 decision, a Panel of the Sixth Circuit Court of Appeals affirmed the attorneys' fees award. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, Tennessee*, 421 F.3d 417 (6th Cir. 2005) ("*Deja Vu II*"). First, the Panel held that this Court's decision in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), did not "upset" the Respondents' status as prevailing parties. *Id.* at 420-21. In so holding, the Panel noted that the rule of law from *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), which states that new Supreme Court rulings must be given retroactive effect, only applies to "cases still open on direct review." *Deja Vu II*, 421 F.3d at 420-21 (citing *Harper*, 509 U.S. at 97). According to the Panel, the underlying ruling on the merits of the *Deja Vu* case became final when this Court initially denied certiorari, (or prior to this Court's ruling in *Z.J. Gifts*,) and thus, the *Harper* rule did not "expose the [underlying merits ruling] to new Supreme Court developments." *Id.*

The Panel next held that the circumstances of this case did not qualify as "special circumstances" that would render the award of attorneys' fees unjust under Section 1988. *Id.* at 422-23. The Metropolitan Government had argued on appeal that the Sixth Circuit should adopt the dictum of the Second Circuit Court of Appeals stating that "a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed" might render an attorneys' fees award "unjust." *New York State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998). (*See Deja Vu II*, 421 F.3d at 422; *see also* Metro's Pet. for Rehearing & Rehearing *En Banc* at 7, App. 281a.) The Panel reasoned that even if it agreed with the dictum in *Terry*, *Z.J. Gifts* arose under "very different circumstances" than those in the *Deja Vu* case and, thus, no "special circumstances" existed in this case. *Deja Vu II*, 421 F.3d at 422-23 & n.3. Circuit Judge Rogers dissented, finding that "[i]f ever 'exceptional circumstances' warrant denial of fees to a prevailing party, it is when that party had prevailed by obtaining injunctive relief that the party clearly was, in retrospect, never entitled to." *Id.* at 424.[1]

The Metropolitan Government then petitioned the Sixth Circuit Court of Appeals for rehearing and rehearing *en banc*, which the court denied. (App. 201a-202a.) This petition for a writ of certiorari followed.

[1] The Sixth Circuit also addressed the Metropolitan Government's objections to the specific amount of fees awarded. However, the Metropolitan Government is not petitioning this Court for a writ of certiorari on that portion of the Sixth Circuit's opinion.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the circumstances of this case are the type of "special circumstances" that render an award of attorneys' fees under 42 U.S.C. § 1988 unjust under *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Because this Court has neither defined "special circumstances" nor instituted a test to determine when "special circumstances" exist in the context of an attorneys' fees statute, the circuits are split as to the appropriate method for determining whether "special circumstances" exist. This split, along with the absence of a Supreme Court defined standard, results in courts awarding attorneys' fees in ways that are irreconcilable with the purposes and policies underlying the statute. Specifically, an attorneys' fees award in a case wherein a final judgment on the merits is followed by a pronouncement of the Court invalidating the theory on which the "prevailing party" obtained judgment in its favor undermines the purposes and policies underlying Section 1988. Accordingly, such circumstances should qualify as "special circumstances" that render the attorneys' fees award "unjust" under Section 1988.[2]

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[2] As the Statement of the Case reflects, the district court dissolved the first preliminary injunction after both the Metropolitan Government amended Chapter 6.54 and the Tennessee General Assembly passed 1998 Tennessee Public Acts Chapter 794. Both amendments were passed to remedy the infirmities identified by the district court in granting the first injunction. Although the Metropolitan Government objected to all of the attorneys' fees in the lower court proceedings, for purposes of this Petition, the Metropolitan Government is seeking review of only the attorneys' fees that accrued subsequent to dissolution of the first injunction.

The instant case is one such situation. The ruling of the Sixth Circuit Court of Appeals on the merits of the instant case directly conflicts with this Court's ruling in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and the Sixth Circuit's attempt to distinguish *Z.J. Gifts* from this case is unwarranted. Further, in failing to acknowledge the circumstances of this case as "special circumstances" that render the attorneys' fees award unjust, the ruling of the Sixth Circuit is irreconcilable with the purposes and policies behind Congress's passage of Section 1988.

1. A Final Judgment on the Merits Deeming a Plaintiff a "Prevailing Party," Followed by a United States Supreme Court Decision Invalidating the Theory on Which the Plaintiff Prevailed, Qualifies as "Special Circumstances" That Render an Attorneys' Fees Award Unjust

42 U.S.C. § 1988 provides that "the court, in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Although the statute suggests that this provision is within the discretion of the court, this Court has recognized that the prevailing party should recover attorneys' fees unless "special circumstances" render an award of attorneys' fees unjust. *Hensley*, 461 U.S. at 429. Thus, when determining whether to award attorneys' fees under Section 1988, courts must determine the meaning of both the statute and the "special circumstances" exception.

The first step in construing statutes is to "'try to determine congressional intent, using traditional tools of statutory construction.'" *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (quoting *NLRB v. United*

Food & Commercial Workers Union, 484 U.S. 112, 123 (1987)). Although the "'starting point is the language of the statute,'" *id.* (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 5 (1985)), "'"in expounding on a statute, [this Court] . . . look[s] to the provisions of the whole law, and to *its object and policy*."'" *Id.* (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)) (emphasis added)).

Although the text of Section 1988 does not specifically provide for a "special circumstances" exception to the awarding of attorneys' fees, an examination of the legislative history of the statute establishes that Congress intended a "special circumstances" exception when it enacted Section 1988. Congress enacted Section 1988 in reaction to this Court's ruling in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. In *Alyeska*, this Court held that attorneys' fees were unavailable to the prevailing parties under civil rights statutes absent specific authorization from Congress. *Alyeska*, 421 U.S. at 271. Thus, Congress enacted Section 1988 to provide specific authorization for attorneys' fees under certain civil rights statutes. S. REP. NO. 94-1011, at 4. The Senate stated: "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.* at 4.

The Senate recognized one such standard by referencing the "special circumstances" exception from this Court's decision in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). S. REP. NO. 94-1011, at 4. In *Newman*, this Court reasoned that, based on the purpose underlying Title II of the Civil Rights Act of 1964, a party who successfully obtains an injunction should receive attorneys'

fees unless special circumstances render an award unjust. *Newman*, 390 U.S. at 402.

In *Newman*, this Court acknowledged that one of the purposes in awarding attorneys' fees under Title II was to "encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* The Senate Report accompanying the bill that became Section 1988 reveals a similar Congressional intent:

> [T]he citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to *vindicate these rights in court*.

S. REP. NO. 94-1011, at 2 (emphasis added).

Similarly, the report accompanying the corresponding House of Representatives bill for Section 1988 recognized that "a vast majority of the victims of civil rights violations cannot afford legal counsel" and "are unable to present their cases to the courts." H.R. REP. NO. 94-1558, at 1 (1976). The drafters of the House bill stated that the award of attorneys' fees under the statute was intended to give people who cannot afford legal counsel "effective access to the judicial process where their grievances can be resolved according to law." *Id.*

Where a party has received relief to which, in retrospect, it was not entitled, the aforementioned purposes underlying Section 1988 are not advanced by awarding attorneys' fees. A party that "prevails" because of a misapplication of the law does not "vindicate" its civil rights as

contemplated by the Senate in drafting Section 1988. Further, such "prevailing parties" are not "victims of civil right violations" as contemplated by the House of Representatives in drafting the bill. The First Circuit has recognized that "the analysis under § 1988 must focus, not on the defendants' conduct, but on the ***harm suffered by the plaintiffs***. . . . " *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st Cir. 1997) (emphasis added) (holding that a defendant's good faith is not a special circumstance). Likewise, the Eighth Circuit has stated, "What a court ought to do, we think, is to concentrate on the objective meritoriousness of a plaintiff's claim, and refuse to award fees if the claim is frivolous or groundless." *Tyler v. Corner Const. Corp.*, 167 F.3d 1202, 1206 (8th Cir. 1999).

This Court addressed the retroactive effect of its decisions on parties in litigation in *Harper v. Virginia Dep't of Taxation*. In *Harper*, the Court stated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97.

Harper should not prevent retroactive application of this Court's rulings to a case wherein there has already been a final order on the merits but attorneys' fees are still at issue. The award of attorneys' fees necessarily follows a final judgment on the merits. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) (recognizing that the determination for the award of attorneys' fees is

separate from and subsequent to a decision on the merits). Specifically, this Court has never addressed the question of whether a final judgment on the merits, followed by a pronouncement of the Court invalidating the theory on which the "prevailing party" obtained judgment in his favor, renders the party no longer "prevailing." Such circumstances, at the very least, should qualify as "special circumstances" that render the attorneys' fees award "unjust" under Section 1988.

In *New York State Nat'l Org. for Women v. Terry*, the Second Circuit Court of Appeals recognized in dicta that "special circumstances" may exist in such a case. *Terry*, 159 F.3d at 97. The court noted that "a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed – might make unjust the subsequent award of attorney's fees to plaintiffs who would no longer be entitled to prevail on this theory." *Id.* The Sixth Circuit has noted that "little guidance has been provided by the Supreme Court as to precisely what constitutes a special circumstance that would defeat a fee award." *Deja Vu II*, 421 F.3d at 422. As a result, the circuits are divided as to the appropriate method for determining whether "special circumstances" exist and, thus, warrant denial of attorneys' fees. *See, e.g.*, *Deja Vu II*, 421 F.3d at 422 (employing a case-by-case approach); *Raishevich v. Foster*, 247 F.3d 337, 344-45 (2d Cir. 2001) (determining first, whether the "plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily obtained" and second, whether the award of attorneys' fees would "work injustice"); *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 264 n.2 (4th

Cir. 1998) (employing a case-by-case approach); *Stefan v. Laurenitis*, 889 F.2d 363, 371 (1st Cir. 1989) (considering "the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose"); *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980) (analyzing first "whether allowing attorney's fees in a particular case would further the congressional purpose in adopting the Acts" and second the "balance of equities").

This split among circuits poses the danger, and creates the result, that courts will enforce Section 1988 in a manner that contravenes the purposes underlying Section 1988. The potential for misapplication of Section 1988 is particularly high in the Sixth Circuit, Fourth Circuit, and First Circuit, all of which specifically reject the Ninth Circuit's approach of considering the purposes underlying attorneys' fees statutes when determining whether "special circumstances" exist. *See, e.g., Wikol v. Birmingham Pub. Schs. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004), *cited in Deja Vu II*, 421 F.3d at 422; *Stefan*, 889 F.2d at 371; *Doe*, 165 F.3d at 264. This is particularly troubling because the Ninth Circuit's test is but a restatement of the accepted methodology of this Court. *See, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (holding that the policy underlying attorneys' fees requires that a prevailing defendant receive an award only when plaintiff's action is "frivolous, unreasonable, or without foundation"), *cited in Hensley*, 461 U.S. at 429 n.2; *see also Farrar v. Hobby*, 506 U.S. 103, 118 (1992) (O'Connor, J., concurring) (stating that whether the plaintiff prevails or not, if a fee award would be unjust, the reasonable fee is no fee); *Indep. Fed'n of Flight Attendants*

v. Zipes, 491 U.S. 754 (1989) (stating that Congress expected courts to consider all competing equities when awarding attorneys' fees; therefore interveners will not be responsible for attorneys' fees unless intervention is "frivolous, unreasonable, or without foundation"); *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (limiting attorneys' fees in civil rights cases to a proportion of the damages award would seriously undermine Congress's purpose in enacting Section 1988); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (noting that Congress did not intend to prohibit all waivers of attorneys' fees under Section 1988); *New York Gas Light Club, Inc. v. Carey*, 447 U.S. 100 (1980) (awarding attorneys' fees for successful work at administrative proceedings furthers Congress's purposes under Title VII).

The Fourth Circuit openly criticized the Ninth Circuit's approach in an IDEA case:

> Prior to *Kay*, the Ninth Circuit suggested that determination of whether "special circumstances" exist in an IDEA case involves examination of 'two factors: (1) whether awarding fees would further the congressional purpose in enacting' IDEA and '(2) the balance of the equities.' *Abu-Sahyun v. Palo Alto Unified Sch. Dist.*, 843 F.2d 1250, 1253 (9th Cir. 1988). Neither the Supreme Court nor this court has embraced this two-part test in subsequent IDEA cases and we decline to do so here. This "test" contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes.

Doe, 165 F.3d at 264 n.2. However, this Court decided *Kay v. Ehrler*, 499 U.S. 432 (1991), by determining whether the

award of attorneys' fees to a prevailing *pro se* litigant, who is also an attorney, would further the overriding Congressional purpose for Section 1988:

> In the end, we agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Kay, 499 U.S. at 437. The fact that the courts may have to weigh competing Congressional interests when deciding whether special circumstances make an award of attorneys' fees unjust is no reason to reject the Ninth Circuit's test. *Indep. Fed'n of Flight Attendants*, 491 U.S. at 761-62. Awarding attorneys' fees on a meritless claim after this Court has invalidated the theory upon which the plaintiff prevailed not only compounds the injustice to the defendant (whether a damages award or an injunction), but it also obstructs Congress's purpose in adopting Section 1988.

2. This Court's Decision in *Z.J. Gifts* Invalidated the Theory on Which Respondents "Prevailed" on the Merits of This Case

In *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, this Court *clarified* what the law is and has been regarding the requirements for "prompt judicial review" of an adult business licensing scheme. 541 U.S. at 776-84. As this Court is aware, *Z.J. Gifts*'s central holding was that ordinary state review procedures, in Colorado as elsewhere, provide constitutionally adequate "prompt judicial

review" of local governments' decisions to deny licenses for adult businesses. *Id.* at 782-84. Specifically, the Court stated:

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally left for case-by-case determination rather than a facial challenge.

Id. at 781-82.

In marked contrast to the holding in *Z.J. Gifts*, in its opinion on the underlying merits of this case, the Sixth Circuit Court of Appeals held the following:

> Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ **guarantees** an aggrieved applicant that a court will hear and decide the merits of her claim as required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)].

Deja Vu I, 274 F.3d at 401 (emphasis added).

Very respectfully, the rationale on which the Sixth Circuit held that the 1999 version of Chapter 6.54 and the 1998 version of T.C.A. § 27-9-111 did not provide prompt judicial review is irreconcilable with the clear language of this Court in *Z.J. Gifts*. In fact, the Sixth Circuit continued to rely on its misapplication of the law in its later opinion in *Deja Vu II*, even after the clear direction of this Court in *Z.J. Gifts*. Specifically, in stating that *Z.J. Gifts* arose under "very different circumstances," the Sixth

Circuit noted that the Metropolitan Government's licensing scheme "relied on a discretionary writ of certiorari and thus might lead to no judicial review at all." *Deja Vu II*, 421 F.3d at 422 & n.3. "That," according to the Sixth Circuit Panel majority, "distinguishe[d] this case from the circumstances of *Z.J. Gifts* itself." *Id.* at 422 n.3.

However, the Sixth Circuit's rationale conflicts with the first two considerations that the *Z.J. Gifts* majority used to analyze the Colorado licensing scheme at issue in that case. In *Z.J. Gifts*, this Court declared both that "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm" and that the Court "ha[d] no reason to doubt the willingness of Colorado's judges to exercise" those tools "so as to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" *Z.J. Gifts*, 541 U.S. at 782 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)). Moreover, the Court explicitly stated that "whether the courts [remain sensitive to the need to prevent First Amendment harms] is a matter normally fit for case-by-case determination rather than a facial challenge." *Id.*

This case, without question, involved a facial challenge. According to *Z.J. Gifts*, the Sixth Circuit should not doubt the willingness of Tennessee judges to utilize all procedural tools available to them "to avoid delay-related First Amendment harm." *Id.* Just as Colorado's rules of procedure provided the option of expedited review as one such "judicial tool," as pointed out by this Court in *Z.J. Gifts*, the Tennessee writ of certiorari statute provided the opportunity for expedited review. T.C.A. § 27-9-111(e) (1998 version, App. 213a).

Furthermore, both the Sixth Circuit's opinion on the merits and its opinion on the attorneys' fees issue were based, at least in part, on an invalid conclusion that the version of the Tennessee writ of certiorari statute at issue in *Deja Vu I*, the 1998 version, remained "discretionary" by allowing Tennessee judges the option of denying certiorari. 1998 Tennessee Public Acts, Chapter 794, which added subsection (e) to T.C.A. § 27-9-111, actually met the Sixth Circuit's unnecessary "guaranteed" standard of prompt judicial review. The Act stated:

> AN ACT to amend Tennessee Code Annotated, Section 27-9-111, relative to judicial review of certain final orders or judgments of a board or commission ***by requiring the hearing and adjudication of the cases within a specified period***.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:
>
> SECTION 1. Tennessee Code Annotated, Section 27-9-111, is amended by adding the following language as a new, appropriately designated subsection:
>
> ( ) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court ***shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari***.

1998 Tenn. Pub. Acts 794 (emphasis added) (App. 272a-274a).[3]

In fact, the Tennessee case on which the Sixth Circuit relied for its conclusion that the writ was still discretionary was a case construing the statute *prior to the 1998 amendment*. *Deja Vu I*, 274 F.3d at 401 (quoting *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965)). As the clear language of the statute indicates, in the context of First Amendment harm, not only is the option of expedited review available, just as in *Z.J. Gifts*, but the statute requires that the "court ***shall hear the matter and issue its decision***." T.C.A. § 27-9-111 (emphasis added) (1998 version, App. 213a).

Moreover, irrespective of the Sixth Circuit's reading of the 1998 writ of certiorari statute, *Z.J. Gifts* dictates that the presumption is that judges will utilize judicial tools, such as the availability of an expedited hearing in the Tennessee writ of certiorari statute, to avoid undue delay in the context of potential First Amendment harm. As such, under *Z.J. Gifts*, the writ of certiorari statute satisfies the "prompt judicial decision" requirement. Even with the Sixth Circuit's reading,[4] Tennessee's "rules provide for

[3] The 1997 version of the writ of certiorari statute did not contain subsection (e). T.C.A. § 27-9-111 (1997 version, App. 215a). Public Chapter 794 (App. 272a-274a) amended the writ of certiorari statute, resulting in the version of § 27-9-111 that was before the Sixth Circuit on the merits and that remained in place until amended again in 2002. T.C.A. § 27-9-111 (1998 version, App. 213a-214a).

[4] Very respectfully, the Sixth Circuit Panel majority is likewise mistaken in its reliance on the 2002 amendment to T.C.A. § 27-9-111(e) as determinative in defeating a claim of "special circumstances." *See Deja Vu II*, 421 F.3d at 422 n.3. Specifically, the Panel majority noted that the fact that what it considered to be the "discretionary" nature of the Tennessee writ was eliminated by the 2002 amendment, after the

(Continued on following page)

a flexible system of review in which judges ***can reach a decision promptly*** in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require." *Z.J. Gifts*, 541 U.S. at 784 (emphasis added). Pursuant to *Z.J. Gifts*, that is constitutionally sufficient.

Consideration of the third factor utilized in the *Z.J. Gifts* decision likewise reveals how the Sixth Circuit failed to distinguish this case from *Z.J. Gifts* itself. As its third consideration of the ordinance at issue in *Z.J. Gifts*, this Court analyzed whether "the typical First Amendment harm at issue [in the case] differ[ed] from that in *Freedman*." *Id.* at 783. Specifically, this Court answered the question by ascertaining whether the Colorado ordinance utilized "reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials." *Id.* As did the Colorado ordinance, the Metropolitan Government's licensing scheme at issue in the instant case utilizes objective, or "neutral and nondiscretionary,"

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merits determination in *Deja Vu I*, is a "kind of responsive change [that] cannot create a special circumstance sufficient to defeat an award of attorneys' fees." *Id.* The 2002 amendment, which became necessary after the Sixth Circuit enforced its unnecessary "guaranteed" standard of prompt judicial review and incorrectly held that the Tennessee writ was still discretionary in the context of the First Amendment, included the addition of the phrase "shall immediately grant the writ of certiorari" to the first sentence of subsection (c). *See* Compiler's Notes to T.C.A. § 27-9-111 (2002 version, App. 211a-212a). Even assuming *arguendo* that the writ remained discretionary (which it did not) prior to that amendment, because *Z.J. Gifts* clarified what the law of "prompt judicial review" is and has been, the 2002 amendment simply was not required. In other words, the Metropolitan Government's licensing scheme's constitutionality, for purposes of a "special circumstances" analysis, **is established by virtue of *Z.J. Gifts***, irrespective of the 2002 amendment.

criteria to distinguish between those who may obtain a license or permit and those who may not. *Id.*; Chapter 6.54.050(B) (App. 240a-243a); Chapter 6.54.080 (App. 252a-253a). In fact, the grounds on which a license will be denied under Chapter 6.54 are strikingly similar to the very criteria at issue in *Z.J. Gifts*. Chapter 6.54.050(B) (App. 240a-243a); Chapter 6.54.080 (App. 252a-253a); *Z.J. Gifts*, 541 U.S. at 783. Furthermore, the Metropolitan Government passed Chapter 6.54 to target the secondary effects of the adult entertainment business and not for the purpose of suppressing speech. *See Deja Vu I*, 274 F.3d at 391-92.[5]

Along a similar vein, another portion of the Sixth Circuit's opinion merits mentioning. In rejecting the Metropolitan Government's argument that the "peculiar circumstances" referenced in *Terry* exist in this case, the Panel stated:

> To begin, even if the "peculiar circumstances" described existed here (as they plainly do not), *Terry* would suggest only that an award of fees *might* be unjust. But that concept gives Metro no comfort, for *Terry*'s "peculiar circumstances" are simply not present in this case.
>
> Indeed, in *Z.J. Gifts* the Supreme Court expressly rejected *Metro's view that only prompt judicial access* is required.

Deja Vu II, 421 F.3d at 422 (second emphasis added).

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[5] The fourth criteria utilized by this Court in *Z.J. Gifts* appears to be more of a rule of law than an actual factor under which an ordinance like Chapter 6.54 must be analyzed. The Court stated, "[N]othing in [prior Supreme Court authority in this area] requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme." *Z.J. Gifts*, 541 U.S. at 784.

Respectfully, in light of the ultimate holding of *Z.J. Gifts*, the Sixth Circuit's focus[6] in this regard is not on point. The fact that the Metropolitan Government, (or the party *against* whom fees were awarded), has at various points in this litigation presented alternative theories or arguments that the Supreme Court rejected is not the appropriate focus of a "special circumstances" inquiry. The

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[6] Moreover, this Court should not accept the Sixth Circuit's language as a pronouncement that the Metropolitan Government has *solely* maintained throughout this litigation that *only access* was required. Like the City of Littleton, Colorado, the Metropolitan Government has argued alternative theories by which it has complied with the prompt judicial review requirement. At multiple stages of this litigation, the Metropolitan Government has recognized the possibility that a judicial *decision* may be required (or *is* required, now that this Court has spoken to the issue). Thus, in 1997, the Metropolitan Government argued in opposition to Respondents' initial motion for an injunction that the possibility for prompt judicial review existed, citing Chapter 6.54, the Local Rules of the Courts of Davidson County, and T.C.A. § 27-9-111. (*See* Mem. Opp. to Mot. Prelim. Inj. at 7-15, App. 353a-362a.) After the district court applied the Sixth Circuit's unnecessary "guarantee" prompt judicial determination standard and enjoined enforcement of Chapter 6.54, the Metropolitan Government petitioned the Tennessee General Assembly, which resulted in 1998 Tenn. Pub. Acts 794 adding subsection (e) to T.C.A. § 27-9-111. The Metropolitan Government also amended Chapter 6.54. The Metropolitan Government moved to dissolve the injunction and again argued that the state courts would and must do their duty and grant the writ of certiorari and issue their decision promptly. (*See* Mem. L. Supp. Mot. Dissolve Prelim. Inj. at 5-10, App. 333a-341a.) As an Appellee before the Sixth Circuit in *Deja Vu I*, the Metropolitan Government again argued that Chapter 6.54 and T.C.A. § 27-9-111 (as amended in 1998) now met the Sixth Circuit's standard of "guaranteeing" prompt judicial review. (*See* Br. of Metro. Gov't Before Sixth Cir. in *Deja Vu I*, Appeal #99-5071, at 14-37, App. 303a-324a.) Again, however, the Metropolitan Government takes the position that any focus on that point is tangential because Respondents did not suffer a civil rights violation.

appropriate inquiry is whether the Supreme Court ultimately rejected the theory upon which the plaintiffs prevailed and ***for which fees were awarded***. In *Z.J. Gifts*, (which, again, simply declared what the law *was* at the time that *Deja Vu I* was decided), this Court did just that. Under such circumstances, an attorneys' fees award to those same plaintiffs is unjust.

In sum, under circumstances such as those in this case, the mandate of this Court is clear: "Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type." *Z.J. Gifts*, 541 U.S. at 784 (internal citations omitted). Simply stated, *Z.J. Gifts*, if appropriately applied to this case, reveals that Chapter 6.54 and T.C.A. § 27-9-111(e), as amended in 1998, satisfied the *FW/PBS* "prompt judicial decision" and invalidated the theory upon which Respondents prevailed.

CONCLUSION

For the reasons stated herein, the Metropolitan Government respectfully requests that this Court grant the petition for a writ of certiorari and resolve the conflict among the circuits by declaring that a final judgment on the merits deeming a plaintiff a prevailing party, followed by a decision of this Court invalidating the theory upon which the plaintiff prevailed, qualifies as a special circumstance rendering an attorneys' fees award unjust. In light of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774

(2004), and the circumstances of this case, the Metropolitan Government respectfully requests that the Court reverse the decision of the Sixth Circuit, remand the case to the district court, and award the plaintiffs only those attorneys' fees incurred prior to dissolution of the first preliminary injunction.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; JERRY C. PENDERGRASS, et al., *Plaintiffs-Appellees,* *v.* THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *Defendant-Appellant.*	No. 03-6521

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 97-01066; 97-01176 – Todd J. Campbell,
District Judge.

Argued: April 20, 2005

Decided and Filed: August 31, 2005

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge;
SHADUR, District Judge.*

ARGUED: Francis H. Young, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellant. Bradley J. Shafer, SHAFER & ASSOCIATES, Lansing, Michigan, for Appellees. **ON BRIEF:** Francis H. Young,

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

James L. Charles, Paul J. Campbell, II, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellant. Bradley J. Shafer, Andrea E. Adams, SHAFER & ASSOCIATES, Lansing, Michigan, for Appellees.

SHADUR, D. J., delivered the opinion of the court, in which BOGGS, C. J., joined. ROGERS, J. (pp. 8-9), delivered a separate dissenting opinion.

OPINION

SHADUR, District Judge. Nearly eight years ago Deja Vu[1] first challenged Chapter 6.54 of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") Code of Laws on First and Fourteenth Amendment grounds. That challenge has generated a lengthy and convoluted history that includes an earlier visit to this Court in 2001 (*"Deja Vu I,"* 274 F.3d 377) – so that "deja vu" provides a particularly appropriate label for this second appeal, which concerns the district court's award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988.[2] We affirm.

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[1] Originally Deja Vu of Nashville, Inc. filed suit together with Michael Rucker, Michael Butler, Merony Entertainment, Inc. (d/b/a Ken's Gold Club), The Pleasure Palace, Inc., Dawn Pierce and Elizabeth Martz. Later added as plaintiffs as a result of case consolidation were Jerry Pendergrass, 421 Corporation and 822 Corporation. For the sake of simplicity, this opinion will refer to the collectivized plaintiffs as Deja Vu (treated as a singular noun).

[2] All further citations to provisions of Title 42 will take the form "Section –."

Enacted on August 19, 1997, Chapter 6.54 required both (1) "sexually oriented" businesses to obtain operating licenses and (2) performers in such businesses to obtain permits. Deja Vu sought to enjoin its enforcement shortly after enactment. In their initial motion for injunctive relief, the original Deja Vu plaintiffs argued that Chapter 6.54 was unconstitutional because it did not provide prompt judicial review. On December 8, 1997 the district court agreed and entered a preliminary injunction. But almost a year later that injunction was dissolved in response to Metro's amendments to Chapter 6.54. Deja Vu appealed.

Two weeks later, on December 17, 1998, Deja Vu filed in the district court a second motion for a preliminary injunction that asserted its previously preserved constitutional claims. Metro responded in two ways: first by assuring the court that certain provisions would be severed and that others would be "subject to a limiting construction," and then by notifying the court that 92 amendments to the ordinance had been enacted. Even so, Deja Vu's motion was granted on October 4, 1999, with Metro being enjoined from enforcing Chapter 6.54 in its entirety. Some ten weeks later the preliminary injunction was made permanent. Although Metro appealed that order, it also enacted further amendments to the ordinance to address the constitutional infirmities identified by the district court. Metro then appealed again when the district court denied its Fed. R. Civ. P. 60(b) motion to dissolve the injunction based on the new amendments.

In *Deja Vu I* we addressed all of the substantive issues preserved for appeal by both Deja Vu and Metro. We concluded (1) that the injunction against enforcement of Chapter 6.54 should remain in effect because that Chapter's

judicial review provisions were constitutionally inadequate and (2) that the statutory definition of "sexually oriented" was unconstitutionally broad but readily severable. Rehearing and rehearing en banc were denied on February 5, 2002, and the Supreme Court denied certiorari on May 13, 2002 (535 U.S. 1073).

Deja Vu has filed Section 1988 motions for attorneys' fees on four separate occasions during the pendency of the action. Its first effort was an interim motion for fees based on its claimed "prevailing party" status as to the initial motion for preliminary injunction. That motion was eventually deemed a final application for fees after the district court entered the permanent injunction, and Deja Vu followed that entry with a second application based on its success on the second motion for injunctive relief. After we decided *Deja Vu I,* Deja Vu filed a third motion for fees associated with the appeal. And after the Supreme Court denied certiorari, Deja Vu filed its fourth and final motion.

Deja Vu's first three motions were considered together by the magistrate judge, who recommended that the motions be granted but did not recommend a specific award amount. That recommendation was approved by the district court on December 6, 2002, as was the parties' stipulation that the magistrate judge's findings, if upheld, called for an award of $431,099.56. Later the magistrate judge recommended that the fourth motion for $46,870 in fees also be granted and that Deja Vu's motion for costs and expenses (to which Metro had failed to respond) be granted in the amount of $58,565.66. Those recommendations were approved by the district court on September 30, 2003. Metro now appeals the combined award of $536,535.22.

Approval of the Fee Award

When a case is brought under of Section 1983, as this one has been, Section 1988 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although "may allow" has a permissive ring to it, the Supreme Court has read it as mandatory where the plaintiff prevails and special circumstances are absent (*see, e.g., Indep. Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 761 (1989)). As to the determination of "prevailing party" status, *Granzeier v. Middleton,* 173 F.3d 568, 577 (6th Cir. 1999) (most citations omitted) has reconfirmed this circuit's standards:

> To be a "prevailing party," a party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." In *Farrar v. Hobby,* 506 U.S. 103, 113 (1992), the Court explained that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties . . . in a way that directly benefits the plaintiffs." The Supreme Court has rejected a "central issue test" which would require a party to succeed on the main issue of the litigation to be considered "prevailing." Rather, a party who partially prevails is entitled to an award of attorney's fees commensurate to the party's success.

In its current appeal Metro raises essentially three objections to the fee awards. First, it argues that the Supreme Court's decision in *City of Littleton v. Z.J. Gifts,* 541 U.S. 774 (2004), which was decided after the fees were awarded, has stripped Deja Vu of its status as a "prevailing party." Second, it contends that even if Deja Vu is still

properly considered a "prevailing party," *Z.J. Gifts* introduces "special circumstances" that render an award of fees unjust. Third, it advances the fallback position that even if Deja Vu is properly viewed as a "prevailing party" and even if no "special circumstances" exist, the specific amounts awarded by the district court were excessive and should be modified downward. For the reasons discussed here, we find none of those arguments persuasive.

"Prevailing Party" Status

It is beyond dispute that as of the dates that the attorneys' fees awards were entered, Deja Vu was a prevailing party under the well-established standards for such awards. After all, the net result of the litigation was the entry of a permanent injunction barring enforcement of Chapter 6.54. That certainly qualifies as an enforceable judgment on the merits that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiffs" (*Farrar,* 506 U.S. at 111-12).

Metro understandably raises no serious objection along those lines. Instead it argues that the intervening decision in *Z.J. Gifts* has changed the legal landscape so that Deja Vu can no longer be considered a "prevailing party." Specifically, Metro contends that the only justifiable basis for a conclusion that Deja Vu was the prevailing party in the litigation is its success on its first motion for injunctive relief because its success on the second motion was de minimis. And because Metro views *Z.J. Gifts* as eviscerating the basis for Deja Vu's success on the first injunction, it concludes that Deja Vu is left without a predicate for prevailing party status.

On that score Metro's position misunderstands the effect that new decisions have on appeals such as this one. *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 97 (1993) requires that new Supreme Court rulings "must be given full retroactive effect in all cases still open on direct review." As Metro would have it, the pendency of this appeal renders the entire controversy between it and Deja Vu "on direct review," so that any new rule announced in *Z.J. Gifts* would be applicable to our disposition here because of *Harper.*

But because *Harper* is limited to cases "still open on direct review," it is important to understand just what is meant by that language. In that respect the Supreme Court has long recognized a distinction between cases "on direct review" and those involving collateral attack on a final judgment (*see, e.g., Bradley v. Sch. Bd. of the City of Richmond,* 416 U.S. 696, 710-11 (1973)). As to the latter category, judgments become final when "the availability of appeal has been exhausted and lapsed, and the time to petition for certiorari has passed" (*id.* at 711 n.14). Under that standard the December 1999 entry of a permanent injunction against the enforcement of Chapter 6.54 certainly qualified as a final judgment: It was affirmed by this court, and the Supreme Court then denied certiorari.

So *Harper* does not apply as to the injunctive relief that Deja Vu obtained against Metro. Instead the *Harper* principle applies only to the issue that is currently "on direct appeal": the award of attorneys' fees. Metro is entitled to the benefit of any new Supreme Court ruling as to that issue, but *Z.J. Gifts* contains no such ruling (nor does any other case). Hence our analysis as to Deja Vu's qualification as the "prevailing party" is unaffected. Deja Vu conclusively prevailed on its claim under Section 1983

when that claim became final, and it is therefore entitled to "prevailing party" status despite any later changes in the law as announced by the Supreme Court. Non-prevailing parties in civil rights actions cannot, by the simple act of filing a much later appeal from a fee award to which the prevailing party is entitled, artificially extend the time that they are beneficiaries of new Supreme Court rulings beyond the time at which the judgment against them has become final.

Our view of *Harper* is consistent with that of the Second Circuit. *New York State National Organization for Women v. Terry,* 159 F.3d 86 (2d Cir. 1998) reviewed an award of attorneys' fees stemming from a Section 1985(3) claim. As here, the Supreme Court had decided a case that arguably reached the merits of the underlying claim after the final judgment but before the disposition of the appeal as to the fee award. But because the Section 1985(3) judgment was final (and so not on direct review), the plaintiff's right to attorneys' fees under Section 1988 was held to be unaffected (*id.* at 96-97):

> Because plaintiffs were prevailing parties under § 1985(3), they were entitled to an award of attorney's fees under § 1988. This was not affected by the fact that, after the judgment in their favor under § 1985(3) became final, new law declared by the Supreme Court would have made them ineligible for a new judgment under § 1985(3).
>
> * * *
>
> It is true the award of attorney's fees was on direct review when *Bray* [*v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993)] was decided, and therefore is subject to the retroactive application of any new rule of law announced therein.

> *See Harper* [, 509 U.S. at 97]. *Bray,* however, did not announce a new rule of law with respect to awards of § 1988 attorney's fees. Its new rule related to entitlement to prevail under § 1985(3).

In short, *Z.J. Gifts* cannot upset Deja Vu's status as a prevailing party on its Section 1983 claim. That status became final when the Supreme Court denied certiorari at the earlier stage of this case, and *Harper* does not expose the Section 1983 determination to new Supreme Court developments. Rather, if *Z.J. Gifts* is to affect the fee award at all, it must do so as a "special circumstance" that renders the award unjust.

Special Circumstances

Even a prevailing party may not be entitled to attorneys' fees if "special circumstances would render such an award unjust" (*Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983)). But little guidance has been provided by the Supreme Court as to precisely what constitutes a special circumstance that would defeat a fee award, and we have recently opted for a case-by-case approach rather than adopting a "predetermined formula" (*Wikol ex rel. Wikol v. Birmingham Pub. Schs. Bd. of Educ.,* 360 F.3d 604, 611 (6th Cir. 2004)). In that case-by-case inquiry, the burden is on the non-prevailing party to make a strong showing that "special circumstances warrant a denial of fees" (*Morscott, Inc. v. City of Cleveland,* 936 F.2d 271, 273 (6th Cir. 1991) (citation omitted)).

Metro contends that the decision in *Z.J. Gifts* is the basis for such a showing. To support that notion, it points to a dictum in the Second Circuit's opinion in *Terry,* 159 F.3d at 97:

> [T]he peculiar circumstances of this case – a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed – might make unjust the subsequent award of attorney's fees to plaintiffs who would no longer be entitled to prevail on their theory.

That language hardly provides a firm footing for Metro here. To begin, even if the "peculiar circumstances" described existed here (as they plainly do not), *Terry* would suggest only that an award of fees *might* be unjust. But that concept gives Metro no comfort, for *Terry*'s "peculiar circumstances" are simply not present in this case.

Indeed, in *Z.J. Gifts* the Supreme Court expressly rejected Metro's view that only prompt judicial access is required. Instead it specifically held that a prompt judicial decision was also necessary. Thus, discussing its earlier opinion in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215 (1990), the Court concluded (*Z.J. Gifts,* 541 U.S. at 781) (citations omitted):

> A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), as encompassing a prompt judicial decision. And we reject the city's argument to the contrary.

To be sure, *Z.J. Gifts* went on to find that ordinary state review procedures will often be – and in the particular

case at issue there they were – constitutionally adequate. But that does not foreclose the result that was reached by the district court in this case under very different circumstances.[3] No "special circumstances" or "peculiar circumstances" exist here such as to call for the adoption of a sort of revisionist history that would cause counsel's services, which were compensable when rendered, to be made noncompensable because of a later development that was triggered by those very services.

Determination of Fees and Costs

Finally, we must consider Metro's objections to the specific fee amounts awarded. Essentially Metro contends that the magistrate judge did not adequately account for Deja Vu's limited success on the second motion for injunction.

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[3] That is particularly true given our conclusion in *Deja Vu I*, 274 F.3d at 400-03, that Metro's judicial review provisions failed to meet even a lesser requirement of judicial access because they relied on a discretionary writ of certiorari and thus might lead to no judicial review at all. That distinguishes this case from the circumstances of *Z.J. Gifts* itself. Metro points out that the Tennessee common law writ of certiorari has since been altered to require judicial review in First Amendment cases, although its counsel admitted during oral argument that the alteration was the direct result of this litigation. We express no view as to whether that change in state procedure eliminates the concerns that we expressed in *Deja Vu I*. But even if it did, that kind of responsive change cannot create a special circumstance sufficient to defeat an award of attorneys' fees. In that respect, the dissent's statement that the ordinance "has been [constitutional] all along" – but "with two qualifications" – glosses over the fact that the most critical of those "qualifications" is the very factor that the law of the case (and hence the continued need for lawyering on Deja Vu's part) held to be a constitutional deficiency: the then-existing purely discretionary potential for judicial review.

On that score *Wilson-Simmons v. Lake County Sheriff's Department,* 207 F.3d 818, 823 (6th Cir. 2000) (echoing *Hensley*) has reconfirmed our prior teaching:

> In light of a district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters, an award of attorneys' fees under § 1988 is entitled to substantial deference.

Hence we review awards of attorneys' fees for abuse of discretion, which exists only when a district court "relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard" (*Wikol,* 360 F.3d at 611).

Metro has presented no basis for any such finding here. Prevailing parties who obtain excellent results – as Deja Vu surely did here, and repeatedly so – are generally entitled to a "fully compensatory fee" (*Hensley,* 461 U.S. at 435). In that context we have repeatedly rejected mechanical reductions in fees based on the number of issues on which a plaintiff has prevailed – as *Thurman v. Yellow Freight Systems, Inc.,* 90 F.3d 1160, 1169 (6th Cir. 1996) (citation omitted) has said:

> However, a court should not reduce attorney fees based on a simple ratio of successful claims to claims raised. When claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced.

And that approach is wholly consistent with *Hensley,* 461 U.S. at 435 (citation and footnote omitted):

> In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing the fee. The result is what matters.

Because the result secured by Deja Vu – a final judgment that permanently enjoined the enforcement of Chapter 6.54 – cannot fairly be labeled as anything short of excellent, it is entitled to a fully compensatory fee. Indeed, the magistrate judge's report and recommendation discounted the fee award by a significant amount to account for the limited success of Deja Vu's second motion, a decision that could perhaps have arrived at a different destination. Because there was no cross-appeal, we have no occasion to review the propriety of that reduction. But there is certainly no basis for Metro to seek a further reduction beyond that already ordered.

Conclusion

Despite the somewhat contorted history of this case, the ultimate impact of the litigation initiated by Deja Vu is beyond dispute: Almost continuously since the lawsuit was initiated, Metro has been permanently enjoined from enforcing the entire Chapter 6.54. That constitutes a legally sanctioned change in the relationship between the two parties more than ample to justify Deja Vu's "prevailing party" status. *Z.J. Gifts* does not affect that status, nor does it introduce any special circumstances that would render an award of fees unjust. Deja Vu is therefore entitled to an award of fees, and nothing about the amount

awarded by the district court represents an abuse of discretion.

Accordingly we AFFIRM the district court's awards of fees and costs.

DISSENT

Rogers, Circuit Judge, dissenting. In my view, in light of *Z.J. Gifts,* the award of fees should be reconsidered.

If ever "exceptional circumstances" warrant denial of fees to a prevailing party, it is when that party had prevailed by obtaining injunctive relief that the party clearly was, in retrospect, never entitled to. That is largely, but not entirely, the case here. *Z.J. Gifts* makes clear that the ordinance at issue is presently constitutional,[1] and, with two qualifications, has been all along. The *Z.J. Gifts* opinion did not "change" the law like a new statute, but made clear what the law is and has been.[2] *See Z.J. Gifts,*

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[1] As the majority notes, the Tennessee common law writ of certiorari has been altered to require judicial review in First Amendment cases. *See* Majority Opinion at n.3; TENN. CODE ANN. § 27-9-111(e) (2002). In *Z.J. Gifts,* the Supreme Court held that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." 541 U.S. at 781. Because the ordinance at issue is now subject to ordinary judicial review in Tennessee courts, it is constitutional under *Z.J. Gifts.*

[2] As Justice Harlan clearly explained, the Supreme Court "announce[s] new constitutional rules . . . only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to

(Continued on following page)

541 U.S. at 780-81 (applying prior Supreme Court opinions).

The two qualifications are (1) the discretionary nature of judicial review prior to the amendment of the judicial review statute in 2002, and (2) the severable statutory definition of "sexually oriented." While an award of fees may be warranted on a "catalyst" theory for the statutory modification that made judicial review mandatory,[3] such a

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apply the Federal Constitution as one source of the matrix of governing legal rules." *Mackey v. United States*, 401 U.S. 667, 678-79 (1971) (Harlan, J., concurring and dissenting). Justice Harlan criticized "[t]he notion that cases before us on direct review need not be adjudicated in accordance with those legal principles governing at the time we are possessed of jurisdiction in the case." *Id.* at 679-80. The Supreme Court explained in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993),

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *American Trucking* [*Ass'ns v. Smith*, 496 U.S. 167], at 214 (Stevens, J., dissenting).

509 U.S. at 97.

[3] Indeed, the Tennessee General Assembly explained the amendment in terms of this court's prior ruling:

> WHEREAS, The United States Court of Appeals for the Sixth Circuit held that Tennessee Code Annotated, Section 27-9-111(e), allows state courts discretion as to whether or not to issue a writ of certiorari and hear an appeal from a decision by a board or commission revoking, suspending or denying a license or permit required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States; and

(Continued on following page)

theory should be ruled upon in the first instance by the district court, independently of the injunctive relief that now in light of *Z.J. Gifts* appears unwarranted.[4] The only remaining qualification to the legal invalidity of the injunctive relief is the definition of "sexually oriented," a victory so Pyrrhic that it cannot support a substantial award of fees in this case. I would remand for reconsideration, taking into account the substantial invalidity (in light of *Z.J. Gifts*) of the broad injunctive relief that forms the basis for determining that counsel achieved "excellent results" in this case.

WHEREAS, The United States Court of Appeals for the Sixth Circuit further held that since the grant of the writ of certiorari remains discretionary in such cases, that Tennessee Code Annotated, Section 27-9-111(e), does not guarantee the petitioner prompt judicial review of the board's or commission's decision, as is required by the First Amendment to the Constitution of the United States; now therefore,

. . .

Section 27-9-111, is amended. . . .

2002 TENN. PUB. ACTS 615.

[4] The district court dissolved the injunction on April 27, 2005. Deja Vu's appeal of that order was recently docketed in this court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6521

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation; JERRY C. PENDERGRASS, et al.,

Plaintiffs – Appellees,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Defendant – Appellant.

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge; SHADUR, District Judge.

JUDGMENT

(Filed Aug. 31, 2005)

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's award of fees and costs is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)
	) NO. 3:97-1066
v.	) JUDGE CAMPBELL
METROPOLITAN GOVERNMENT of NASHVILLE/ DAVIDSON COUNTY, et al.	) CONSOLIDATED CASES

ORDER

(Entered September 30, 2003)

Pending before the Court are a Report and Recommendation of the Magistrate Judge (Docket No. 283), dated September 16, 2003. The Court has reviewed the findings of the Magistrate Judge and the file.

The Report and Recommendation (Docket No. 283) is APPROVED. Plaintiffs' Fourth Motion for an Award of Attorney Fees (Docket No. 256) is GRANTED, and the Plaintiffs are awarded attorney fees of $46,870.00. In addition, the Plaintiffs' refiled Motion for Costs and Expenses (Docket No. 269) is GRANTED, and the Plaintiffs are awarded costs and expenses of $58,565.66.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.; MICHAEL RUCKER; MICHAEL BUTLER; MERONEY ENTERTAINMENT, INC.; CAROUSEL AMUSEMENT CENTER, INC.; DAWN PIERCE; and ELIZABETH MARTZ	No. 3-97-1066
v.	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	Consolidated with
and	
EMMITT TURNER, Chief of Police and JERRY C. PENDERGRASS; 822 CORPORATION; and 421 CORPORATION	3-97-1176
v.	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE	

To: The Honorable Todd J. Campbell, United States District Judge

REPORT AND RECOMMENDATION

(Entered September 16, 2003)

Before the Court is the plaintiffs' fourth application for an award of attorney fees (Docket Entry No. 256)

pursuant to 42 U.S.C. § 1988, and the plaintiffs' refiled motion for costs and expenses (Docket Entry No. 269).

I. BACKGROUND

On August 19, 1997, the Council of the Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This chapter, and subsequently enacted amendments to it, required "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The plaintiffs in this action are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. The plaintiffs in the first filed case ("the Deja Vu plaintiffs") filed this action under 42 U.S.C. § 1983, on October 17, 1997, against the Metropolitan Government of Nashville and Davidson County and Emmitt Turner in his official capacity as the Chief of Police of the Metropolitan Police Department, seeking a preliminary injunction, and declaratory judgment to determine the constitutionality of Chapter 6.54. On November 10, 1997, the plaintiffs in the second listed action (the "Pendergrass plaintiffs") moved to intervene as plaintiffs in this case, and commenced their own lawsuit, alleging similar claims, and seeking a preliminary injunction.

By order entered December 8, 1997 (Docket Entry No. 23), the two actions were consolidated, mooting the motion of the Pendergrass plaintiffs to intervene, and the defendants were enjoined from enforcing any of the provisions

of Chapter 6.54 because the ordinance failed to provide for prompt judicial review of decisions by the Sexually Oriented Business Licensing Board. The Metropolitan Council subsequently amended the ordinance to correct the defects upon which the preliminary injunction was based, and, by order entered December 3, 1998 (Docket Entry No. 76), the injunction was dissolved. The dissolution of the injunction was appealed to the Sixth Circuit Court of Appeals (Docket Entry No. 94).

By order entered October 4, 1999 (Docket Entry No. 189), the Court granted a second motion for a preliminary injunction that was filed by the plaintiffs, finding that the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts were unconstitutional. Because the Court found that the offending provisions could not be severed from the ordinance as a whole, the Court enjoined the defendants from enforcing Chapter 6.54 in its entirety.

By order entered December 23, 1999 (Docket Entry No. 199), the preliminary injunction was made permanent and the defendants were permanently enjoined from enforcing Chapter 6.54. The defendants appealed that order (Docket Entry No. 208), and the plaintiffs filed a cross-appeal (Docket Entry No. 212) of a portion of the December 23, 1999, decision. By order entered May 24, 2000 (Docket Entry No. 228), the Court denied the defendants' motion to vacate or dissolve the injunction under Rule 60(b) of the Federal Rules of Civil Procedure because of amendments to the ordinance. The defendants filed a notice of appeal from that order (Docket Entry No. 233).

By mandate issued December 6, 2001, the Sixth Circuit Court of Appeals affirmed in part and reversed in part. Specifically, the Court of Appeals affirmed the District Court's finding that the definitions of "sexually oriented business establishment" and "sexually oriented theater" were not unconstitutionally overbroad, and that the no touch/buffer zone provision was constitutional, but the Court found that the unconstitutionally overbroad definition of "sexually oriented" could easily be severed from the ordinance. The Court also found that the civil disabilities provision, the disclosure provision, and the fee amounts were constitutional, reversing the District Court's finding that such provisions were unconstitutional. *Deja Vu v. Metropolitan Government,* 274 F.3d 377 (6th Cir. 2001). The Court reversed the District Court's finding that the judicial review proceedings were constitutional, and remanded with instructions that the injunction against enforcement of the ordinance should remain until the constitutional problems with the definition of "sexually oriented" and the judicial review procedures were corrected.

Rehearing and rehearing en banc were denied by the Court of Appeals on February 5, 2002, and certiorari was denied by the United States Supreme Court on May 13, 2002.

Four motions for awards of attorney fees were filed by the plaintiffs. The Magistrate Judge issued a Report and Recommendation on October 1, 2002 (Docket Entry No. 265), recommending that the first three motions (Docket Entry Nos. 158, 201, and 240) be granted in part. The Magistrate Judge found that the plaintiffs should not be awarded attorney fees related to claims upon which they did not prevail, and disallowed certain fees. Docket Entry

No. 265, at 13. The Magistrate Judge also noted that there are circumstances in which it is impossible to "separate out with a fine tooth comb the work on one contention advanced from another." *Id.* Thus, although hours not reasonably expended were not compensated, *see Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the plaintiffs were entitled to recover a "fully compensatory fee" that was not reduced "simply because the plaintiff[s] failed to prevail on every contention raised in the lawsuit." *Id.* In addition, the Magistrate Judge found that the amounts sought as expenses should be denied at that time, with leave to the plaintiffs to refile a motion seeking an award of expenses with a detailed explanation of the necessity and propriety of such expenses. The Report and Recommendation was adopted by order entered December 6, 2002 (Docket Entry No. 276).

On June 12, 2002, the plaintiffs filed their fourth motion for attorney fees (Docket Entry No. 256), requesting an additional award of fees in the amount of $48,980.03. On October 17, 2002, the plaintiffs refiled a motion for costs and expenses (Docket Entry No. 269). These motions are the subject of this Report and Recommendation.

II. DISCUSSION

A. The plaintiffs' fourth motion for attorney fees

The plaintiffs' fourth motion requests $46,870.00 in attorney fees and $2,109.03 in costs, for a total of

$48,980.03.[1] Exhibit B to Docket Entry No. 257, at 12. The plaintiffs submit that these fees represent attorney fees and expenses incurred in successfully responding to the defendants' petition for a writ of certiorari filed in the United States Supreme Court, seeking reversal of the decision of the Sixth Circuit in this case; billing related to the preparation and submission of the previously filed attorney fee motions; matters relating to the preparation and submission of this motion; and billings related to attorney fees incurred in opposing this Court's lifting of the first preliminary injunction that can now be claimed given the denial by the United States Supreme Court of the defendants' petition for a writ of certiorari relating to the 'judicial review' issue. Docket Entry No. 258, at 5, ¶ 10. Since the plaintiffs achieved a great deal of success on all of the issues for which they now seek fees, the Court cannot recommend that any of the fees be disallowed.[2]

However, the defendants argue that the rates charged for attorney fees are unreasonable. In the instant motion, the plaintiffs' counsel seek to be reimbursed at an hourly rate of $200.00 per hour for partners and $150.00 an hour for associates for time spent in 1998 and 1999. The defendants object to these rates and argue that any reimbursement for work done in 1998 and 1999 should be charged at rates being charged at that time, i.e., $175.00 per hour for

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[1] The costs requested by the plaintiffs in their fourth motion for fees are incorporated into their refiled motion for costs and expenses (Docket Entry No. 269).

[2] Although the defendants argue that the plaintiffs were not prevailing parties in respect to the first three motions for attorney fees, they do not specifically address any fees requested in the plaintiffs' fourth motion. The plaintiffs are clearly prevailing parties on the matters involved in their fourth motion.

partners and $125.00 per hour for associates, and not their current rates.[3]

In *Missouri v. Jenkins,* 491 U.S. 274, 283, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989), the Supreme Court found that "in setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." The Sixth Circuit Court of Appeals, found that the holding in *Missouri v. Jenkins* "does not mean that a court should apply the hourly rate at which an attorney currently bills clients. Rather, it means, the court should apply the current market rate for an attorney with the experience the plaintiffs attorney had at the time of the litigation." *Harper v. BP*, 2001 U.S. App. LEXIS 1084, *13, 2001 WL 92139 (6th Cir. Jan. 22, 2001).

The Court finds that the rates of $200.00 per hour for partners and $150.00 per hour for associates is within the current market rate for attorneys with the legal experience plaintiffs' attorneys had during 1998 and 1999, as confirmed by the affidavits filed in support of the attorney fee motions.[4]

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[3] According to the Court's calculations, the plaintiffs' attorney fees requested during 1998 and 1999 equal $10,480.00 of the $46,870.00 in attorney fees requested in the fourth motion. If the Court were to accept the defendants' method of calculation, these fees would be reduced to $8,747.50, a difference of $1,732.50.

[4] In their reply (Docket Entry No. 264), the plaintiffs, for the first time, contend that they are "not only entitled to the higher [current] hourly rates for the limited hours claimed in the fourth motion, but are clearly entitled to these enhanced rates for *all* time expended in pursuit of this litigation." Docket Entry No. 264, at 6. Since the first three motions have already been resolved, this argument is moot.

B. The plaintiffs' refiled motion for costs and expenses

On October 17, 2002, the plaintiffs filed their refiled motion for costs and expenses. Docket Entry No. 269. The plaintiffs also filed a brief in support of this motion. Docket Entry No. 270. In their brief, the plaintiffs include a detailed explanation and description of the necessity and propriety of their costs and expenses. *See* Docket Entry No. 270. The plaintiffs also cite case law in support of their contentions regarding travel related expenses, overnight delivery charges, computer research, and copying expenses. *See id.*[5] Since the defendants have not filed a response to the plaintiffs' refiled motion (Docket Entry No. 269), the Court finds that there is no opposition to the motion. *See* Local Rule 8(b)(3).[6]

III. RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the plaintiffs' fourth motion for an award of attorney fees (Docket Entry No. 256) be GRANTED, the plaintiffs be awarded $46,870.00 in attorney fees, and that the plaintiffs' refiled motion for costs and expenses (Docket

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[5] In the December 6, 2002, Report and Recommendation, the Court noted that all expenses for overnight delivery and delivery service charges should be disallowed. However, in the renewed motion, the plaintiffs have provided a cogent explanation of the necessity of these expenses.

[6] Even if the Court were to construe section 5 of the defendants' objections to the Report and Recommendation (Docket Entry No. 273) as a response, the defendants do not cite any authority in support of their opposition. Without citing any case law in the paragraphs addressing expenses, the defendants essentially argue that the expenses should be discounted on the same basis as the attorney fees were reduced.

Entry No. 269) be GRANTED, and the plaintiffs be awarded $58,565.66 in costs and expenses.

Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this Report and Recommendation to which the objection is made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

2001 wl 1546311

United States Court of Appeals,
Sixth Circuit.
DEJA VU OF NASHVILLE, INC., a Tennessee corporation; Michael Rucker, individually; Michael Butler, individually; Meroney Entertainment, Inc., d/b/a Ken's Gold Club, a Tennessee corporation; The Pleasure Palace, Inc., a Tennessee corporation; Dawn Pierce, individually; Elizabeth Martz, individually; Jerry C. Pendergrass, individually; The 822 Corporation; The 421 Corporation, Plaintiffs-Appellants, Plaintiffs-Appellees, Plaintiffs-Appellees/Cross-Appellants,
v.
The METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; Emmett Turner, Chief of Police of the Metropolitan Police Department, Defendants-Appellees, Defendants-Appellants, Defendants-Appellants/Cross-Appellees.

Nos. 99-5071, 00-5881, 00-5284, 00-5288.

Argued Jan. 24, 2001.
Decided and Filed Dec. 6, 2001.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. Nos. 97-01066, 97-01176 – John T. Nixon, Thomas A. Higgins, District Judges.

ARGUED: Bradley J. Shafer, Shafer & Associates, P.C., Lansing, MI, for Plaintiffs.

Karl F. Dean, Metropolitan Government of Nashville & Davidson County, Nashville, TN, for Defendants.

ON BRIEF: Bradley J. Shafer, Andrew K. Wilkins, Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants, Memphis, TN, H. Louis Sirkin, Laura A. Abrams, Jennifer M. Kinsley, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison, for Plaintiffs. Francis H. Young, Shayna R. Abrams, Metropolitan Department of Law, Nashville, TN, for Defendants.

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

On August 19, 1997, the Council for the Metropolitan Government of Nashville and Davidson County, Tennessee, passed an ordinance, now codified as Metropolitan Code of Laws Chapter 6.54, "Sexually Oriented Businesses," containing licensing requirements for adult entertainment businesses. Shortly thereafter, plaintiffs in this consolidated appeal filed suit in federal court to enjoin the Ordinance's enforcement on First and Fourteenth Amendment grounds. Since that time, injunctions have been issued, dissolved, and issued anew in response to the four amended versions of the Ordinance enacted by Metropolitan Nashville during the four-year pendency of this litigation.[1] The parties now appeal and cross-appeal

[1] Although Metropolitan Nashville has enacted four new versions of the Ordinance in response to various rulings by the district court, with the most recent version enacted in 2000, only the 1999 version is

(Continued on following page)

various aspects of the district court's injunctive and procedural rulings.

I.

The Ordinance requires all "sexually oriented businesses" to obtain a license issued by the Sexually Oriented Businesses Licensing Board before being permitted to operate. *See* Metropolitan Code of Laws § 6.54.030(A). Additionally, all entertainers working within a sexually oriented business must obtain a permit from the Board. *See* M.C.L. § 6.54.060(A). The permit requirements are essentially identical to the license requirements. *See* M.C.L. § 6.54.080(A). Licenses and permits must be renewed on a yearly basis, and can be suspended or revoked for, among other things, repeated failure to comply with any of the licensing or permitting requirements, failure to pay required fees, or knowingly denying access to law enforcement personnel during business hours. *See* M.C.L. §§ 6.54.110; 6.54.150(A)(2), (3), and (6). The Ordinance includes a civil disability provision (M.C.L. §§ 6.54.050(B)(2); 6.54.080(A)(2)), a disclosure provision (M.C.L. §§ 6.54.040(A)(5); 6.54.070(A)(4)), and a no-touch/buffer zone provision (M.C.L. § 6.54.140(C)), applicable to all license and permit-seekers. Metropolitan Nashville charges applicants five hundred dollars to apply for a license, and one hundred dollars to apply for a permit. *See* M.C.L. § 6.54.090.

The plaintiffs are a group of establishments and individuals providing adult entertainment in the form of

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relevant to this appeal. Every citation thus will be to the 1999 version unless otherwise noted.

live nude or semi-nude performance dance, as well as selling, renting or presenting sexually oriented books, magazines, and videos. The "Deja Vu plaintiffs" include four corporations, two owner/operators, and two dancers. The "Pendergrass plaintiffs" include two corporations and one owner/operator. All the plaintiffs fall within the Ordinance's definitions of either "sexually oriented business," "operator," or "entertainer," and thus each is subject to the Ordinance's requirements. *See* M.C.L. §§ 6.54.010(G), (P), and (Y), respectively.

In October 1997, the Deja Vu plaintiffs sought a preliminary injunction based solely on the ground that the Ordinance failed to provide prompt judicial review of licensing decisions by the Board. The Deja Vu plaintiffs reserved their right to request a future preliminary injunction on other grounds. Shortly thereafter, the Pendergrass plaintiffs filed a similar complaint, requesting a preliminary injunction on the grounds that the Ordinance failed to provide prompt judicial review of licensing decisions and that its civil disability provisions violated the First Amendment. On December 11, the district court consolidated the two cases and granted a preliminary injunction because the Ordinance failed to provide for prompt judicial review; the district court did not address the constitutionality of the disability provisions. Metropolitan Nashville subsequently amended the Ordinance, and, on December 7, 1998, the district court dissolved the preliminary injunction. The plaintiffs timely appealed the dissolution.

The plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance. On October 1, 1999, the district court granted the motion, finding the definitions of "sexually

oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts unconstitutional. The court further found that the tainted provisions could not be severed, and therefore enjoined the entire Ordinance. In December, the district court made the preliminary injunction permanent. Metropolitan Nashville timely appealed the district court's decision striking down the definitions and the civil disability, disclosure, and fee provisions; the refusal to sever the tainted provisions; and the imposition of the permanent injunction. The plaintiffs timely cross-appealed the district court's decision upholding the Ordinance's definition of "sexually oriented business/establishment" and the buffer zone/no-touch provision. The plaintiffs also appealed the district court's grant of a protective order to Metropolitan Nashville.

In early 2000, Metropolitan Nashville again amended the Ordinance to remove the portions that the district court found unconstitutional, and then filed a Rule 60(b) motion to dissolve the injunction with the district court. The district court denied the motion on the grounds that it no longer had jurisdiction over the case because Metropolitan Nashville had already appealed its judgment to this Court. Metropolitan Nashville timely appealed that decision as well.

II.

As an initial matter, we note that none of Metropolitan Nashville's issues on appeal have been rendered moot by the current version of the Ordinance, which was enacted in early 2000. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its

power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Here, Metropolitan Nashville explicitly enacted the 2000 version in order to enforce the Ordinance pending this appeal. It has repeatedly expressed its intention to reenact those portions of the Ordinance judged unconstitutional by the district court at the earliest opportunity. Accordingly, we must now address the constitutionality of the following portions of the Ordinance: the definitions of "sexually oriented," "sexually oriented business/ establishment," and "sexually oriented theater;" the civil disability provision; the disclosure provision; the fees provision; the buffer zone/ no touch provision; and the mechanisms provided for judicial review. We review a district court's decision to grant or deny a permanent injunction, including both its factual and legal conclusions, *de novo* when constitutional facts are at issue. *See Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir.1997). All other factual findings are reviewed for clear error. *See Id.*

A.

First, we must examine the Ordinance's definitions of "sexually oriented," "sexually oriented business/ establishment," and "sexually oriented theater" to determine whether they are unconstitutionally overbroad. A law is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep. *New York v. Ferber*, 458 U.S. 747, 771 (1982). The overbreadth doctrine exists "to prevent the chilling of future protected expression." *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir.2001). Therefore, any law imposing restrictions so broad that it chills speech

outside the purview of its legitimate regulatory purpose will be struck down. For the same reason, the plaintiffs have standing to challenge the Ordinance's overbreadth even though they do not dispute that the Ordinance applies to each of them. "The overbreadth doctrine constitutes an exception to traditional rules of standing" and allows claimants to assert the rights of parties not before the court. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir.1994).

We agree with the district court that the definition of "sexually oriented" is unconstitutionally overbroad. In relevant part, the Ordinance defines "sexually oriented" as "any exhibition of any motion pictures, films or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y). "Specified anatomical areas" include "[l]ess than completely and opaquely covered" buttocks and female breasts. M.C.L. § 6.54.010(BB). Thus, any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a "sexually oriented" film under the Ordinance, irrespective of whether the film's content constitutes "adult entertainment" or causes the type of secondary effects, such as crime (sexual and nonsexual) and public health risks, that Metropolitan Nashville seeks to regulate. Because this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad.

We do not, however, find the definition of "sexually oriented business/establishment" overbroad. The Ordinance defines a "sexually oriented business/establishment" at Section 6.54.010(Z) as:

> Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observations by patrons therein.

Four subsections then follow this definition, defining the terms "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. §§ 6.54.010(Z)(1)-(4). If the "sexually oriented business/establishment" definition stood alone, we would find it unconstitutionally overbroad, as it could encompass such businesses as a hotel that offers its guests access to an adult cable channel. The record reflects, however, that a business will be subject to the Ordinance's licensing requirements only if the business satisfies both the "sexually oriented business/establishment" definition *and* one of the four subsections' definitions. When read in conjunction with the four subsections, the definition no longer sweeps too broadly.

For the same reason, we find no constitutional problem with the Ordinance's definition of "sexually oriented theater," the only subsection definition challenged by the plaintiffs on appeal. "Sexually oriented theater," defined in Section 6.54.010(Z)(3), means:

> [A]n enclosed area, not including a booth, regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

"Specified sexual activities" include sexual intercourse *and fondling of* buttocks or breasts. *See* M.C.L. § 5.43.010(CC). A significant number of mainstream movies depict people fondling breasts or buttocks, and an even larger number "relate to" sex. Again, the risk that this definition might chill a range of protected speech would require us to find it unconstitutionally overbroad if it stood alone. The additional requirement of being a "sexually oriented business/establishment," however, narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth.[2]

Finally, even though we find the Ordinance's definition of "sexually oriented" overbroad, we must, if possible, give effect to the Ordinance's severability clause so as not to invalidate the entire act. *See Moore v. Fowinkle*, 512 F.2d 629, 637 (6th Cir.1975). By including a severability clause, found at Section 6.54.170, Metropolitan Nashville created a presumption that it did not intend the statute's validity to hinge on any constitutionally infirm provision. *See Immigration & Naturalization Serv. v. Chadha*, 462

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[2] We note that these constitutional issues would never have arisen had the Ordinance been written more clearly. Section 6.54.010(Z) could have simply stated that its definition must be read in conjunction with its subsections. Alternatively, the Ordinance could have defined "sexually oriented business/establishment" at Section 6.54.010(Z) as "any one of the following businesses," and then listed the four businesses currently defined in the subsections (with the necessary limiting language incorporated into each business's definition). Whatever the difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities.

U.S. 919, 932 (1983). We find that the definition of "sexually oriented" can easily be severed from the Ordinance without having any impact on the licensing scheme. In fact, we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. Our independent review of the Ordinance reveals that, indeed, the phrase "sexually oriented" is never used but in conjunction with some other word that has its own definition. *See generally* § 6.54.010 (containing definitions of "sexually oriented films," "sexually oriented theaters," and "sexually oriented nightclubs," to name a few). For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must.

B.

Metropolitan Nashville next appeals the district court's decision that the Ordinance's "civil disabilities provisions" violate the First Amendment. Under those provisions, no individual license or permit applicant who has had a misdemeanor conviction for a crime of a sexual nature may receive a license or permit for two years following the date of the conviction.[3] *See* M.C.L. §§ 6.54.050(B)(2)(a);

[3] The following constitute "crimes of a sexual nature" under the Ordinance: "the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given." M.C.L. § 6.54.010(D).

6.54.080(A)(2)(a). No applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *See* §§ 6.54.050(B)(2)(b); 6.54.080(A)(2)(b).

To satisfy Article III's standing requirement, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999). The Supreme Court has further defined the injury-in-fact requirement by stating that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs Deja Vu and Michael Butler, Deja Vu's former Vice-President, are the only Deja Vu plaintiffs who allege they have standing to challenge the civil disabilities provisions because Butler was convicted of statutory rape in 1995. Although they acknowledge Butler no longer works for Deja Vu, they claim that he quit his job only because Deja Vu was forced to seek a license in 1999, after the district court dissolved the first preliminary injunction and denied plaintiffs a stay pending its decision on their motion for a second preliminary injunction. Therefore, Deja Vu and Butler contend they were forced to choose between the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [they believed] to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). They argue that they should not be denied standing to challenge the civil disabilities

provisions merely because Butler no longer works for Deja Vu, when it was the enforcement of that very provision that forced Butler to resign.

Although attractive, this argument has no merit under standing jurisprudence. Because Deja Vu does not currently employ anyone who could arguably be subjected to the disabilities provisions, any threat it alleges with regard to those provisions is, by definition, hypothetical. Hypothetical injury does not equal injury-in-fact. *See Lujan*, 504 U.S. at 560. Moreover, Deja Vu did not rehire Butler as Vice President when the district court enjoined enforcement of the civil disabilities provisions, nor does it allege any plans to do so should we uphold that injunction. Similarly, Butler does not allege he would seek such a job were it not for the disabilities provisions. Therefore, neither plaintiff has suffered a harm likely to be redressed by a favorable decision. *See Coyne*, 183 F.3d at 494 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982)). Because none of the other individual plaintiffs alleged that the civil disability provisions rendered them ineligible to receive a permit, we agree with Metropolitan Nashville that none of the Deja Vu plaintiffs have standing to challenge the civil disabilities provisions.

We find, however, that the Pendergrass plaintiffs do have standing to challenge the provisions. At the time the district court ruled on this issue, Jerry Pendergrass was an officer, a director, and the sole shareholder of the 822 Corporation. Pendergrass was convicted of a misdemeanor obscenity offense on May 22, 1997, and he was required to apply for a license by March 15, 1999, within two years of the date of his conviction. Because of the civil disabilities

provisions, Pendergrass, and consequently the 822 Corporation, was ineligible to receive an operating license. Accordingly, both parties have standing to challenge those provisions.

The Pendergrass plaintiffs' challenge has not been mooted merely because over two years have passed and his business now possesses an operating license, as this case falls squarely within the "capable of repetition, yet evading review" exception to mootness. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Under this exception, the Pendergrass plaintiffs must show that 1) the challenged action will be of a duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a "reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* Even if an applicant seeks a license the day after his or her misdemeanor conviction, that still leaves only two years for the applicant to exhaust the Ordinance's application and appeal procedures and fully litigate the claim in the federal courts. As a practical matter, this cannot be done. Additionally, because the range of disabling sex crimes is relatively large, and because, as Metropolitan Nashville itself points out, it is reasonably foreseeable that someone with a sex crime history will choose to work for or be involved with a sexually oriented business, there is a reasonable probability that a future person connected with the 822 Corporation will have a criminal history that renders the Corporation ineligible for a license under the civil disabilities provisions. Therefore, we will proceed to the merits of the plaintiffs' claim.

"[N]ude dancing of the type at issue here is expressive conduct," which falls "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529

U.S. 277, 289 (2000) (plurality opinion). Therefore, any ordinance regulating nude dancing must be analyzed to ensure it does not unduly impair the exercise of First Amendment rights. The level of scrutiny we apply depends on the type of regulation we address. For instance, if the challenged law is "content based," that is, intended to impact speech, the law must survive strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Turner Broad.*, 512 U.S. at 642. Systems of prior restraint will be upheld only if they provide for prompt judicial review of all decisions denying the right to speak, while also passing the appropriate level of scrutiny. *See Freedman v. State of Maryland*, 380 U.S. 51, 58-59 (1965).

The plaintiffs argue that the Ordinance should be subjected to strict scrutiny because the civil disabilities provisions amount to an unlawful prior restraint in violation of the First Amendment. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials," and any system of prior restraint carries a heavy presumption against its validity. *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000). Although the plaintiffs are correct in asserting that the Ordinance constitutes a system of prior restraint, that argument more properly applies to our examination of the Ordinance's mechanisms for providing prompt judicial review, *see* Part II. F, *infra*, rather than our decision of which level of constitutional scrutiny to apply. What the plaintiffs actually, though obliquely, argue here is that the Ordinance is content-based, and thus must withstand

strict scrutiny. *See, e.g., Turner Broad.*, 512 U.S. at 642. Metropolitan Nashville responds that the Ordinance is a content-neutral regulation aimed at redressing the secondary effects of sexually oriented businesses that must satisfy the less-demanding four-part test of *O'Brien*.

We have previously recognized that ordinances aimed at regulating adult entertainment businesses constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998). To withstand constitutional scrutiny, then, (1) the Ordinance must have been enacted within Metropolitan Nashville's constitutional power; (2) the Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir.1995) (citing *O'Brien*, 391 U.S. at 377).

The parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's stated interests in reducing crime, open sex, and the solicitation of sex are substantial. *See Richland Bookmart, Inc.*, 137 F.3d at 440. Moreover, regulations aimed at redressing the secondary effects of the sex industry are unrelated to the suppression of erotic speech. *See East Brooks Books, Inc.*, 48 F.3d at 226. Therefore, we need only determine whether the Ordinance's civil disabilities

provisions constitute merely an incidental burden on the plaintiffs' First Amendment rights that is essential to furthering Metropolitan Nashville's stated interest in battling the secondary effects of the sex industry.

The Supreme Court has recently noted that "crime and other public health and safety problems are caused by the presence of nude dancing establishments. . . . " *Pap's A.M.*, 529 U.S. at 300. The Ordinance's civil disabilities provisions serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress by temporarily disqualifying those who have recently committed such acts from working for sexually oriented establishments, or alternatively, from declaring any sexually oriented establishment closely associated with such an individual ineligible to operate. In light of the temporary nature of the ban and the narrow reach of the provisions (applying only to those who have committed a felony sex crime within the last five years or a misdemeanor sex crime within the last two years), we do not find that these provisions violate the Constitution.

Contrary to the plaintiffs' arguments, our holding in *City of Paducah v. Investment Entm't, Inc.*, 791 F.2d 463 (6th Cir.1986), does not control this case. In *City of Paducah*, we invalidated a municipal regulation that revoked all business licenses and permits from those businesses whose employees had distributed or exhibited obscene material. *See City of Paducah*, 791 F.2d at 464. In that case, however, we explicitly found that the purpose of the challenged portion of the regulation was "to control future expression by businesses that have been subjected to the nuisance abatement procedure." *Id.* at 470. In contrast, we find here that the Ordinance's civil disabilities provisions exist to combat the sex crimes connected with sexually

oriented establishments by temporarily prohibiting those recently convicted of such crimes from employment with those establishments. Because both the Ordinance and the civil disabilities provisions are unrelated to speech, we are faced with a different issue than that decided in *City of Paducah*. Furthermore, because *City of Paducah* was a "prior restraint" case, it was concerned with whether the regulation at issue provided sufficient mechanisms for prompt judicial review. *See Id.* We agree that the instant Ordinance must provide for prompt judicial review, and that such review must encompass any findings of ineligibility pursuant to the civil disabilities provisions. *See* Part II. F, *infra*. Nothing in the civil disabilities provisions themselves, however, renders them facially unconstitutional, and we decline to tie the hands of local governments by extending *City of Paducah's* reasoning to those regulations aimed only at redressing the secondary effects of the sex entertainment industry.

C.

Because the district court found the Ordinance's civil disabilities provisions unconstitutional, it also invalidated its "disclosure provisions" which require that applicants provide certain information in order to conduct a background check into each applicant's criminal history. The disclosure provisions require that license and permit applicants divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years. *See* §§ 6.54.040(A)(5)(a), (b), and (c); 6.54.070(A)(4)(a), (b), (c), and (d). Additionally, applicants must provide their fingerprints and two portrait photographs to facilitate the background check, which the

Metropolitan Police Department conducts. *See* §§ 6.54.040(A)(5)(g); 6.54.070(A)(4)(g). Because each plaintiff either has or will have to apply for either a permit or a license, all are required to provide this information to the Board. Accordingly, all the plaintiffs have standing to challenge this provision.

The Ordinance states that the required disclosures are "for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature." *See* M.C.L. § 6.54.040(A)(5)(c); M.C.L. § 6.54.070(A)(4)(c); M.C.L. § 6.54.070(A)(4)(d). Because this purpose is "unrelated to the suppression of expression," we again apply the four-part *O'Brien* test to determine whether the disclosure provisions are unconstitutional. *Pap's A.M.*, 529 U.S. at 289.

As stated above, *O'Brien* requires us to determine whether Metropolitan Nashville enacted the disclosure provisions (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc.*, 48 F.3d at 226. Here, Metropolitan Nashville legitimately enacted the disclosure provisions in order to facilitate the background check. In addition, the required disclosures ensure continuing compliance with the Ordinance's licensing and permitting requirements. Although the plaintiffs point to testimony by Metropolitan Police Department Vice Squad Captain Bawcum that only a person's name and date of birth are used to run a background check, they do not argue that the required disclosures do not further Metropolitan Nashville's substantial governmental interest in

eradicating the secondary effects of sexually oriented businesses.[4] "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Borman's, Inc. v. Mich. Prop. & Cas. Guar. Assoc.*, 925 F.2d 160, 162 (6th Cir.1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). The plaintiffs have failed to convince us that requiring identifying information as part of the application process does not facilitate enforcement of the Ordinance's provisions (for instance, by assuring that the entertainer displaying the permit matches the physical description contained in the applicant's file). The provisions thus satisfy the first, second, and third parts of the *O'Brien* test.

The plaintiffs argue that the disclosure provisions fail the fourth prong, however, because under the Tennessee Open Records Act, members of the public with illicit motives can easily obtain the personal information contained in the plaintiffs' application files, which includes their names and residential addresses. Therefore, the provisions will pose more than an incidental burden on

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[4] Simply because Metropolitan Nashville codified only its interest in facilitating the background checks as the justification for the required disclosures, we are not prohibited from taking into account other interests the disclosures may serve. "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring in the judgment).

First Amendment activities because those wishing to engage in such activities will be chilled by the threat of public exposure and possible violence. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (stating purpose of First Amendment is "to protect unpopular individuals from retaliation – and their ideas from suppression"). Metropolitan Nashville responds that the required information is protected from public release (1) by the district court's order; (2) by Metropolitan Nashville's own opinion; (3) by the Tennessee Attorney General's opinion; and (4) by our decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir.1998) (finding release of certain personnel information constitutionally prohibited).

Metropolitan Nashville's first three arguments cannot stand. First, the district court sealed the application files only "during the pendency of this litigation," and therefore its order is insufficient to protect any applicant's information indefinitely. Second, neither Metropolitan Nashville nor the Tennessee Attorney General have the power to create exceptions to Tennessee's Open Records Act. The Tennessee Supreme Court has interpreted the Tennessee Open Records Act, T.C.A. § 10-7-503(a), to mean that "the legislature reserved to itself alone the power to make public policy exceptions." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn.1994) (quoting *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn.1986)). Nonetheless, we agree with Metropolitan Nashville that our decision in *Kallstrom* saves this provision from being unconstitutional by prohibiting public release of all applicants' names and current and past residential addresses.

Kallstrom held that police officers have a constitutionally protected privacy interest in their otherwise-public personnel file information, which includes addresses, phone numbers, and family member information, when the release of that information creates "a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Kallstrom*, 136 F.3d at 1063. Here, the plaintiffs presented significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security. For instance, plaintiff Dawn Pierce, an entertainer at Deja Vu, testified that entertainers in the past have been stalked, harassed, and injured by customers, and that she is afraid to make public her name and residential address, as required by the Ordinance, because of serious potential risks to her physical safety and well-being. Dancers use stage names and have unpublished addresses and telephone numbers in order to minimize the risks of such harassment. Additionally, Pierce testified that there are a number of local organizations that have taken a strong stance against her profession. She is therefore also concerned that requiring her to release her name and residential address to a public forum will result in such groups harassing her at her home as a result of her choice to engage in erotic speech. Such risks also apply to individual business associates, such as registered agents, officers, directors, certain shareholders, club managers, and assistant managers, all of whom are likely to have to provide their names and addresses to the Board. *See* M.C.L. § 6.54.040(A)(5)(i), (j).

Applying *Kallstrom's* reasoning to this context, we find that all sexually\oriented business license and permit

applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal. "Anonymity is a shield from the tyranny of the majority," *McIntyre*, 514 U.S. at 357, but it is not a shield from all legitimate regulation. Therefore, as a result of our decision in *Kallstrom*, prohibiting public dissemination of the required private information, Metropolitan Nashville's disclosure requirements satisfy the fourth part of *O'Brien* because they are essential to ensuring continuing compliance with the Ordinance's licensing and permitting requirements, and because the reporting requirements pose only an incidental burden on applicants.

D.

The plaintiffs next challenge the constitutionality of the fees charged pursuant to the Ordinance. The government may not tax the exercise of a constitutionally protected right. *See Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir.1997). Nonetheless, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity." *Id.* at 1109-10. Such a fee is not excessive, even if it is more than nominal, so long as it is "reasonably

related to the expenses incident to the administration of the ordinance." *Id.* at 1110.

The Ordinance charges applicants five hundred dollars for a license, and one hundred dollars for a permit. Additionally, the Ordinance requires that "[i]f the [license or permit] application is denied, one-half of the fee shall be returned." *See* M.C.L. § 6.54.090(A), (B). Although the district court found the direct cost of processing license applications was thirty-three dollars, and the direct cost of processing permit applications was forty-three dollars, it failed to include in its calculations the $40,000 paid annually to an inspector "to enforce the civil disabilities provision," because it had already held that provision unconstitutional. The record reflects that comparing the yearly total of estimated fee revenue with the annual costs of enforcing the Ordinance results in a net loss to Metropolitan Nashville. Accordingly, we find that the fees charged are reasonably related to the expenses incident to the administration of the Ordinance.

E.

Next the plaintiffs raise challenges to the Ordinance's "no touch/buffer zone" provision. Section 6.54.140(C) states that

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

As with any other violation of Chapter 6.54, one violation of the buffer zone may result in a five hundred dollar fine, suspension of the operating license for between five and thirty days, or both. *See* M.C.L. § 6.54.150(B)(2). A second violation within a two-year period requires suspension for between thirty-one and ninety days. *See* M.C.L. § 6.54.150(B)(3). A third violation will result in a one-year revocation of the license. *See* M.C.L. § 6.54.150(C)(9).

As an initial matter, we note that the three-foot buffer zone surrounds the stage, not the dancer. Therefore, we reject the plaintiffs' argument that the provision creates a "floating buffer zone." *See* M.C.L. § 6.54.140(C); M.C.L. § 6.54.050(A)(3) (stating "[a] three-foot boundary from the outer edge of the stage shall be indicated on the floor . . . so that the customer will not invade the three-foot boundary").

We find that this provision also satisfies the *O'Brien* test: Metropolitan Nashville properly passed this portion of the Ordinance pursuant to its police power; it intended this provision to redress the high instances of sex crimes prevalent at sexually oriented businesses and to deter the spread of disease; and requiring dancers to perform on stages removed three feet from any customer poses only an incidental burden on their right to erotic speech that is no greater than is essential to further Metropolitan Nashville's substantial interests. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412-13 (6th Cir.1997) (upholding six-foot buffer zone to more effectively enforce ban on contact between erotic dancers and audience members and to prevent occurrence of activities likely to result in criminal behavior or to prevent risk of disease).

We agree with the plaintiffs that the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a "collective effort on behalf of shared goals." *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). The dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless. The right to associate for expressive purposes, however, is not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville has gone no farther than necessary by requiring a three-foot distance between the erotic dancer and the audience. *See DLS*, 107 F.3d at 412-13.

The plaintiffs repeat the same arguments we rejected in *DLS*. First, they argue that the no touch/buffer zone provision goes too far because of its economic impact on the relevant market. Specifically, the plaintiffs point to evidence showing that compliance with the no touch/buffer zone provision will require extensive renovations of their clubs. We rejected that argument, however, in *DLS*, noting that the relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses. *Id.* at 413. "[T]he First Amendment requires only that [Metropolitan Nashville] refrain from effectively denying [sexually oriented business owners] a reasonable

opportunity to open and operate an adult theater within the city. . . . " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). Although we do not doubt that compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments.

Second, the plaintiffs argue that the provision denies to erotic dancers the ability to profit from their expression by foreclosing the possibility of receiving tips. The plaintiffs are correct that the government cannot prohibit compensation for the exercise of First Amendment rights. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991). Customers, however, remain free under the Ordinance to tip dancers before or after their performances. Alternatively, the clubs could decide to increase dancers' salaries, rather than requiring them to earn a living wage from their tips. In any event, the no touch/buffer zone provision merely requires that audience members not hand the dancers money during their dances, a sufficiently limited burden on the plaintiffs' First Amendment rights. For a similar reason, we also reject the plaintiffs' argument that the buffer zone violates the First Amendment by prohibiting all verbal communication between entertainers and customers. Again, if customers and entertainers cannot converse while standing a mere three feet apart, it is because the plaintiffs have chosen to play their music at such a volume that conversation is impossible. Contrary to the plaintiffs' claims, the Ordinance does not force entertainers to choose between verbal communication and no music; as Metropolitan Nashville suggests, the plaintiffs can simply turn their music down a bit. The point is that any problems dancers

may experience with receiving tips or speaking with customers will be caused not by the Ordinance, but by the clubs' refusal to alter their standard operating procedures in response to these constitutional regulations.

Finally, the plaintiffs challenge the no touch/buffer zone provision on the ground that it does not contain a mens rea requirement. As the Ordinance does not expressly limit the prohibited touching to intentional or knowing touches, the plaintiffs claim that even entertainers who merely seek to push a customer away will violate it. We disagree with the plaintiffs' reading of this provision. The provision states, in relevant part, that "[n]o customer shall be permitted to have any physical contact with any entertainer" during a live performance, and that all such performances must occur on a stage "removed at least three feet from the nearest customer." M.C.L. § 6.54.140(C). Rather than reading the provision as enacting two separate requirements, we read it as a single mandate, with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage. *See also* § 6.54.050(A)(3) (detailing the licensee club's responsibility for noticeably demarcating the three-foot buffer zone). Furthermore, logic compels this interpretation. It would simply be nonsensical for Metropolitan Nashville to put the onus of customer control

on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Accordingly, we reject the plaintiffs' claim that the no-touch/buffer zone provision imposes *any* duty on entertainers, much less one that requires them to be held strictly liable for any violations.

Moreover, the Ordinance does not allow for strict liability, even for licensees. Section 6.54.150(B)(1) states that a club will be fined or have its license suspended (or both) for violating any of the Ordinance's provisions. However, Subsection (B)(1) also affords licensees the affirmative defense that management was "powerless to prevent" the violation. Accordingly, liability for violating the no-touch/buffer zone provision is limited to those instances where a licensee could have, but failed to prevent the proscribed conduct. The provision, thus interpreted, is constitutional.

F.

Finally, we address the plaintiffs' argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman v. Maryland*, 380 U.S. 51 (1965). Specifically, the plaintiffs argue that because the Ordinance requires them to proceed to court via a common law writ of certiorari, it fails to protect their right to expeditious judicial review on the merits.

Before reaching that issue, however, we must address Metropolitan Nashville's argument that the plaintiffs have failed to present us with a justiciable controversy. We review issues of Article III justiciability *de novo*. *See NRA v. Magaw*, 132 F.3d 272, 278 (6th Cir.1997).

1.

Metropolitan Nashville argues that the plaintiff businesses and operators have no standing to challenge the licensing procedures because they have all been issued licenses. For support, Metropolitan Nashville cites *DLS*, which held that a business and its owner did not have standing to challenge a licensing procedure under which they had already received licenses. *See DLS*, 107 F.3d at 413.

> If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses. . . . Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III.
>
> *Id.*

Metropolitan Nashville misunderstands the plaintiffs' argument. Here, plaintiffs have raised a facial challenge claiming that the Ordinance's procedures for reviewing Board decisions fail to provide for prompt judicial review as required by *Freedman*. The appeal procedures under the Ordinance are essentially identical whether the Board initially refuses to grant a license, or whether the Board suspends or revokes an already-existing license. *See*

§§ 6.54.040(E)(2) (procedure for appealing denial of license); 6.54.150(E)(6) (procedure for appealing suspension or revocation of license). Therefore, this case is distinguishable from the *DLS* scenario, where "[a]ny modification to the licensing scheme would have no effect on the potential threat that [the plaintiffs] face under renewal or revocation proceedings." *See DLS*, 107 F.3d at 414.

It is immaterial that Metropolitan Nashville has not yet sought to suspend or revoke the plaintiffs' licenses. A mere threat to First Amendment interests is a legally cognizable injury. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989). "In the area of freedom of expression, it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license." *Freedman*, 380 U.S. at 56. Arguing that a statute lacks sufficient procedural safeguards is one way to allege overly broad licensing discretion.

> [Plaintiff's] argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the . . . statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

Id. at 57. "By the same token, . . . Plaintiff does not have to wait until his license is revoked to have standing to challenge the allegedly overbroad licensing scheme that would allow its revocation." *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir.1994). Therefore, the plaintiff businesses and operators

have standing to raise their facial challenge to the Ordinance.

Additionally, we find this case ripe for review. Ripeness requires that the "injury in fact be certainly impending." *NRA*, 132 F.3d at 280 (citation omitted). The doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir.1999) (internal quotation marks and citations omitted). In determining whether the entertainers' claim is ripe, we consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Id.* at 1058.

Metropolitan Nashville claims that the entertainers are not under any threat with regard to the Ordinance because the entertainers have not yet sought a permit. We disagree. The entertainers join with the other plaintiffs in challenging the Ordinance's judicial review provisions. Because this is a purely legal issue, and because, as already demonstrated, the plaintiffs have standing to raise it, the issue is fit for a judicial decision. Moreover, as Metropolitan Nashville acknowledges in its brief, "[p]arties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to 'chill the exercise of free speech and expression,' a constitutionally protected right." Gov. Br. at 12 (citing *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir.1995)). The plaintiffs facially challenge the Ordinance's overbreadth, alleging that the lack of prompt judicial review vests too much discretion in the Board. By

Metropolitan Nashville's own admission, then, their claim is ripe for review.

2.

We now turn to the merits of the plaintiffs' claim that the Ordinance constitutes a system of prior restraint, and that it fails to guarantee the requisite prompt judicial review of license/permit denials and revocations. We review a district court's order dissolving a preliminary injunction for an abuse of discretion, reviewing *de novo* where the dissolution is based upon a legal conclusion. *See Reese v. City of Columbus*, 71 F.3d 619, 622 (6th Cir.1995). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir.1995). "A factual or legal error alone may be sufficient to establish that the court abused its discretion in making its final determination." *Id.* (internal punctuation and citations omitted).

A district court must consider four factors when determining whether to grant or deny a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *See Dixie Fuel Co.*, 171 F.3d at 1059-60. In First Amendment cases, the first factor will often be determinative. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). This is because the Supreme Court has recognized that even minimal infringement upon First

Amendment values constitutes irreparable injury. *See Newsom*, 888 F.2d at 378. Additionally, if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *See Connection Distrib.*, 154 F.3d at 288. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, we shall focus our attention on the first factor.

A "prior restraint" exists when the exercise of a First Amendment right depends on the prior approval of public officials. *See Nightclubs, Inc.*, 202 F.3d at 889 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Freedman*, 380 U.S. at 57. In *Freedman*, a unanimous Supreme Court found that three procedural safeguards were required for a prior restraint scheme to avoid constitutional infirmity. *See Id.* at 58-59. First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. *See Id.* at 59. Second, the licensing scheme "must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor. *See Id.* at 58. Licensing schemes in a city ordinance regulating sexually oriented businesses constitute a prior restraint that must incorporate at least the first two *Freedman* procedural safeguards. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990)

(plurality opinion of O'Connor, J.);[5] *see also Nightclubs, Inc.*, 202 F.3d at 890; *East Brooks Books, Inc.*, 48 F.3d at 224.

Sections 6.54.040(E) and 6.54.070(D) of the Ordinance provide the procedures for obtaining relief from the denial of a license or permit:

> Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.[6]

> Tennessee state law requires that if an appeal is taken from an administrative decision barring an applicant from engaging in First Amendment activities, "the court shall hear the matter and issue its decision within forty (40) days of the court

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[5] Three justices held only the first two *Freedman* safeguards applied, three justices would have applied all three, *see Id.* at 238-39 (Brennan, J., concurring in the judgment), and three more would not have applied any. *See Id.* at 244 (White, J., concurring in part and dissenting in part); *see also Id.* at 253 (Scalia, J., concurring in part and dissenting in part). Accordingly, at a minimum, we must apply the first two *Freedman* safeguards.

[6] Although this language could be read as authorizing two avenues for appeal, a direct appeal by which Metropolitan Nashville does not have to file the record of all proceedings within ten days, and an appeal via a common law writ of certiorari whereby Metropolitan Nashville must timely file the record, Metropolitan Nashville insisted at oral argument that the provision authorizes only an appeal via the common law writ.

granting the writ of certiorari." T.C.A. § 27-9-111 (Michie 1999). The plaintiffs argue that these provisions fail to comply with the first two *Freedman* safeguards. We agree.

"Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965). Thus, the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a "final judicial adjudication on the merits," as required under *Freedman's* first safeguard. Metropolitan Nashville points to *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), for support that Tennessee courts will not deny a writ in this context. *See Id.* at 815 (finding that writs should issue where denial of the writ is "tantamount to the denial to either party of a day in court"). Even that case, however, reiterates the rule that "certiorari is a discretionary writ." *Id.* at 814 (noting that whether a lack of appellate remedy exists is "critical" for determining whether to grant a writ). Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman*.[7]

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[7] Theoretically, for instance, an aggrieved applicant could file a § 1983 suit against the Board and its members. Although such a suit would not provide complete relief, as the applicant would be foreclosed from "speaking" until a final adjudication, it is a far cry from the facts of *Johnson*, where the court found the erroneous suppression of evidence would force Metropolitan Nashville to drop its criminal charges against the defendant and that double jeopardy would prohibit the city from filing new charges. In that context, Metropolitan

(Continued on following page)

Metropolitan Nashville also argues that the plaintiffs' concern that the courts may not promptly determine whether or not to grant the writ petition is unfounded. For support, Metropolitan Nashville cites to an affidavit presented to the district court from the Clerk and Master for the Chancery Courts of Davidson County, stating that "[g]enerally, our office processes all petitions for a writ of certiorari . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are *guaranteed* prompt judicial review.

First, the affidavit does not address Davidson County's circuit courts, where the Ordinance also directs that an aggrieved applicant's appeal may lie. Therefore, the record is completely absent of any evidence as to the turn-around time of petitions filed with the circuit court, and it was clearly erroneous of the district court to find otherwise. More importantly, the affidavit only avers the chancery court's *general* practice. The Constitution requires more. "[A]ny limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" *Nightclubs, Inc.*, 202 F.3d at 891 n. 6 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 700 (1988)). A well-established practice is one where "a well-understood and *uniformly applied* practice has developed that has virtually the force of a judicial construction." *City of Lakewood*, 486 U.S. at 770 n. 11 (emphasis added). In the absence of such strong evidence, "[w]e can neither

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Nashville would have literally had no legal recourse if the court had denied its petition for a writ of certiorari, and it is therefore at least potentially distinguishable from this case.

presume that municipal officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into an ordinance that is not fairly and evidently present." *Nightclubs, Inc.*, 202 F.3d at 891 n. 6. A "uniformly applied" practice is simply not the same as a "generally" applied one. Because the chancery court clerk's affidavit does not present such strong evidence, and because the record contains no evidence as to the circuit court's practices, we cannot agree with the district court that the Constitution's requirements have been satisfied by this proof.

Second, the affidavit purports only to describe the average length of time it takes to "process" all petitions for a writ of certiorari. It says nothing about whether the court is obligated to grant the writ at all, and therefore, it fails to address the biggest problem with the Ordinance's judicial review provision. Without some affirmative evidence showing that every writ of certiorari will be granted, we find that the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment.[8] The lack of a judicial review provision renders the entire statute facially unconstitutional, and therefore, severing the ineffectual provision will not save

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[8] The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication on the merits and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal. *See* M.C.L. 6.54.040(E)(3) and (4); *see also* M.C.L. 6.54.070(D)(3) and (4) (applying same rules to permit applicants). Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme "must *assure* a prompt judicial decision." *See Freedman*, 380 U.S. at 59 (emphasis added). The Ordinance's discretionary appeals procedure fails to satisfy these separate requirements.

the statute. Under these circumstances, we cannot give effect to the severability clause, but must enjoin enforcement of the entire Ordinance.

III.

In the first of two final matters, the plaintiffs ask us to vacate the magistrate's grant of a protective order to Metropolitan Nashville with regard to the plaintiffs' discovery requests dealing with Metropolitan Nashville's basis for believing sexually oriented businesses cause "secondary effects." The plaintiffs concede, however, that although they moved for the district court to review the magistrate's decision, the court did not rule on the motion before issuing its decisions enjoining the Ordinance's enforcement. We decline to rule on the propriety of the magistrate's order before the district court has a chance to review it.

Finally, we briefly address Metropolitan Nashville's argument that the district court erred in finding that its appeal to this Court divested the district court of jurisdiction to hear its Rule 60(b) motion to dissolve the permanent injunction. The filing of an appeal with this Court generally divests a district court of jurisdiction over the case. *See First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 (6th Cir.1976). In the district court's discretion, however, it may enter an order stating that it is disposed to grant a Rule 60(b) motion, which would allow the requesting party to move this Court to remand the case, thereby once again vesting jurisdiction in the district court. *See id.* at 346. Nonetheless, Metropolitan Nashville concedes that the district court is under no obligation to issue such an order, and in fact characterized this appeal

as a "procedural misstep" at oral argument. We agree. The district court did not abuse its discretion in refusing to rule on Metropolitan Nashville's Rule 60(b) motion following Metropolitan Nashville's appeal to this Court.

IV.

For the foregoing reasons, we AFFIRM the district court's finding that the definition of "sexually oriented" is unconstitutional under the First Amendment. We further AFFIRM the district court's finding that the definitions of "sexually oriented business/establishment" and "sexually oriented theater," and the no touch/buffer zone provision satisfy the First Amendment. Finally, we AFFIRM the district court's refusal to hear Metropolitan Nashville's Rule 60(b) motion. We REVERSE, however, the district court's finding that the civil disabilities provision, the disclosure provision, and the fee amounts are unconstitutional. We further REVERSE the district court's finding that the Ordinance's judicial review procedures satisfy the First Amendment. Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of "sexually oriented" and its judicial review procedures have been corrected.

HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part.

CONCURRING IN PART, DISSENTING IN PART

I concur in the Chief Judge's opinion in this difficult case in most respects. I write separately to set out my views with respect to part II.F dealing with standing and prompt judicial review. The majority found that prompt

judicial review is "required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]." *Supra* at 26. *Freedman*, however, involves a very different set of circumstances from the present controversy, because that case presented a First Amendment challenge to the "Maryland motion picture censorship statute."[1] *Id.* at 52. The Supreme Court pointed out that under the Maryland law in question "there is *no* statutory provision for judicial participation in the procedure which bars a film, *nor even assurance of prompt judicial review.*" *Id.* at 55 (emphasis added). Furthermore, the Court recognized the unique nature of the film industry, stating that "a censorship system for motion pictures presents *peculiar dangers* to constitutionally protected speech." *Id.* at 57 (emphasis added). Our present case, of course, does not involve freedom of speech in a film, but freedom of expression in a sexually-oriented place of business.

I. *STANDING*

I would not hold *Freedman* controlling on the issue of standing because of the circumstances in that case are entirely different from those in the instant controversy. This court has interpreted *Freedman* broadly to apply to similar types of cases brought by adult "entertainment" operators and performers, such as plaintiffs. For example, *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir.1994), cited by the majority, involved "threatened revocation" of a liquor license if topless dancing were to occur at an Inkster, Michigan bar

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[1] Indeed, in *Freedman*, the state conceded "that the picture [at issue] does not violate the statutory standards." *Freedman*, 380 U.S. at 52.

and nightclub. *G & V Lounge, Inc.*, 23 F.3d at 1073. With that scenario and the evidence of threatened and imminent action by the state of license revocation, this court held that plaintiff operator had standing to bring a First Amendment claim, citing Supreme Court authority, including *Freedman*. Standing would be present in such a situation even if no revocation had taken place.

In the instant case, however, the plaintiffs make no allegation of threatened revocation of their licenses (or actual censorship). The majority recognizes Metropolitan Nashville's argument "that the plaintiff businesses and operators have no standing to challenge the license procedures because they have all been issued licenses." What it fails to recognize, however, is that no plaintiff has been threatened with revocation under the ordinance. Metropolitan Nashville concedes that "parties not yet affected by actual enforcement of the statute are allowed to challenge actions under the First Amendment." It is doubtful, however, particularly in light of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir.1997), that the plaintiffs, not operating under any threat of revocation, would have standing to challenge the constitutionality of procedures involved in the Ordinance at issue.

I would hold that plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but do not have standing to challenge "the licensing scheme." *See DLS*, 107 F.3d at 413. In *DLS*, we reasoned that the plaintiffs lacked such standing because they "already have succeeded in obtaining a license under [the applicable ordinance]. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under [different

provisions]." *Id.* I am not persuaded that, in the instant case, the procedures involved for revocation are not different from the procedures required for applying for initial licenses.

I find neither *Newsom v. Norris*, 888 F.2d 371 (6th Cir.1989), nor *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th cir.1995), both cited in the majority opinion, to be particularly helpful to plaintiffs on the issue of standing. *Newsom* involved a prison setting and alleged retaliation against inmate advisors. *Dambrot* involved a university's alleged discriminatory harassment policy in a discharge situation addressing the issue of freedom of speech. Neither case involved the type of expression here involved, held repeatedly to be subject to reasonable, narrowly drawn state regulation.

FW/PBS is a case much more analogous to this case than *Freedman*. The city ordinance in *FW/PBS* purported to regulate businesses similar to those operated by plaintiffs in this case. Plaintiffs were permitted to raise a facial challenge to the ordinance because special inspections and certificates of occupancy were demanded of sexually-oriented businesses. Such provisions are absent from the Metropolitan Nashville ordinance.

II. *PROMPT JUDICIAL REVIEW*

The Court in *Freedman* emphasized that the censorship of a film "puts an initial burden on the exhibition."[2] *Id.* Again, this is not the situation in the instant controversy.

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[2] "Films differ from other forms of expression." *Freedman*, 380 U.S. at 61.

In the film censorship area, *Freedman* mandated a procedure "which must ... assure a prompt final judicial decision." *Id.* at 59. The Supreme Court emphasized the need for prompt judicial review of film censorship laws, recognizing that in the Maryland scheme there was "*no assurance* of prompt judicial determination." *Id.* at 60 (emphasis added). Apparently, the scheme contained no provision for judicial review of film censorship, an entirely different circumstance from the instant case. Whether or not there is an adequate provision for prompt judicial review in these circumstances is a legal question and forms a basis for injunctive relief if it is wanting. The legality of prior restraints of freedom of expression in adult sexually-oriented businesses, while not illegal per se, requires the special attention of this court. *FW/PBS*, 493 U.S. at 225-26. To be constitutional, a prior restraint must place reasonable and prompt time constraints on the administrative process of issuing business licenses and permits and must provide "expeditious judicial review" of administrative decisions. *Id.* at 227 (citing *Freedman*, 380 U.S. at 58-60).[3]

The Court in *FW/PBS* mandated that any such licensing scheme provide for the "*possibility* of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228 (emphasis added). The Court also relied on the specific circumstances of that case in holding that, unlike *Freedman*, the city did not have the burden of proof once in court. *Id.* at 230. The question of prompt judicial review of the license permit action was whether there were

[3] *FW/PBS* makes it clear that the "licensing scheme" in this type of case "does not present the grave dangers of a censorship system" that was present in *Freedman*. *FW/PBS*, 493 U.S. at 228.

"adequate bulwarks."[4] *Id.* Moreover, the Court in *FW/PBS* raised on its own volition the question of standing of certain plaintiffs who challenged the civil disability provision of the ordinance. *Id.* at 234-35. The Court held that there was no standing to challenge revocation on the basis of past criminal conviction or conduct where no petitioner actually demonstrated revocation of a license under the civil disability provision. *Id.* at 235.

I believe that the Ordinance at issue does meet the standards set out in *FW/PBS*, because it provides for much more than a "possibility" of prompt judicial review. Sections 6.54.04(E) and 6 .54.070(D) of the ordinance specify certain procedures for obtaining relief from denial of a license or permit. First, a denial "*may be* immediately appealed to the circuit or chancery courts of Davidson County." (Emphasis added.) There is no requirement in the ordinance as to the form of relief that may be sought by the unsuccessful applicant.[5] There is no reason why an applicant may not pursue a declaratory judgment action or seek injunctive relief if a constitutional issue is claimed to be involved in either state or federal court because of an asserted invalid or improper denial. If the applicant, under the above sections of the ordinance, does choose to appeal by seeking a writ of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial. Contrary to the Chief Judge,

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[4] The authority cited for this proposition was *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1962), a book censorship case. The Rhode Island law at issue in *Sullivan* provided for no judicial review.

[5] Despite any purported argument made to the effect that appeal by writ of certiorari is the only statutory avenue of relief upon denial of an application, the ordinance speaks for itself in this regard.

I believe that *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), does support the proposition that Tennessee court would entertain a petition for a writ of certiorari from denial of an application even if the action taken were discretionary in nature.

I respectfully disagree with the statement by the majority in footnote 7, because temporary injunctive relief or mandamus could issue in a § 1983 suit against Metropolitan Nashville if an application were denied based on, for example, racial, sexual, or other illegal discriminatory animus, thus allowing the plaintiff to "speak" pending final adjudication. Furthermore, under the majority holding of *FW/PBS*, I believe that a rejected applicant has the opportunity for an adequate and expeditious judicial review based upon available remedies, as supported also by the affidavit of the Clerk of the Davidson County Chancery Court. There is a sufficient protection in such an event of denial of a meritorious application under the ordinance and the proof for prompt judicial review; in short, there is an "adequate bulwark" by judicial review available. The majority opinion states in footnote 8 that "[t]he ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

In sum, I respectfully disagree that there is, in this ordinance, "lack of judicial review provision." There is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review. We

are not dealing in this case with censorship, or attempted censorship, of speech, books, or films (as in *Freedman, supra*).

Finally, even if the judicial review provisions were inadequate, I would conclude that the severance provision in the ordinance is effective, and I would not agree to void enforcement of the entire ordinance because of perceived insufficient means of prompt judicial review.[6]

Accordingly, I respectfully dissent from parts of the majority decision for the reasons indicated.

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[6] A case cited as giving support to the majority view is a four-to-three decision of the court, *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), which permitted a facial challenge to a municipal ordinance regulating newspaper racks on city streets. The later case of *FW/PBS* states the principle applicable in this situation: "Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *FW/PBS*, 493 U.S. at 230.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-5071; 00-5284/5288/5881

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS, individually; THE 822 CORPORATION; THE 421 CORPORATION,

Plaintiffs-Appellants (99-5071),
Plaintiffs-Appellees (00-5881),
Plaintiffs-Appellees/Cross-Appellants (00-5284/5288),

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMETT TURNER, Chief of Police of the Metropolitan Police Department,

Defendants-Appellees (99-5071),
Defendants-Appellants (00-5881),
Defendants-Appellants/Cross-Appellees (00-5284/5288).

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART, and the case is REMANDED in accordance with the opinion of the court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green 12-6-01
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	NO. 3:97-1066
v.	)	JUDGE CAMPBELL
METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY, et al.	)	CONSOLIDATED CASES

ORDER

(Entered Oct. 9, 2003)

Pending before the Court is Defendants' Motion to Alter or Amend Final Order on Attorneys' Fees (Docket No. 286). Defendants ask the Court to amend the Order (Docket No. 284) to reflect the fact that Defendants filed a timely objection to the Magistrate Judge's Report and Recommendation.

Defendants' Motion is GRANTED. Defendants filed a timely Objection to the Report and Recommendation (Docket No. 285), on the same day this Court entered its Order (Docket No. 284). Having reviewed Defendants' Objection, the Court finds that nothing therein changes the result of its prior Order. That Order (Docket No. 284) is amended, however, to reflect that Defendants did file a timely Objection thereto.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL,
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al. v. METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY, et al.	NO. 3:97-1066 JUDGE CAMPBELL CONSOLIDATED CASES

ORDER

(Entered Dec. 6, 2002)

Pending before the Court are a Report and Recommendation of the Magistrate Judge (Docket No. 265), dated October 1, 2002; Plaintiffs' Objections thereto (Docket No. 267); and Defendants' Objection thereto (Docket No. 273). The Court has reviewed the findings of the Magistrate Judge, the Objections and the file.

Plaintiffs' and Defendants' Objections are OVERRULED, and the Report and Recommendation (Docket No. 265) is APPROVED, adjusted for the mathematical and typographical errors corrected by Plaintiffs regarding Plaintiffs' First Motion for Attorneys' Fees (*see* Docket No. 268, pp. 3-4).

The Report and Recommendation does not include a final total for the amount owed. The parties shall attempt to agree on that figure, based upon the allowances and disallowances of the Report and Recommendation and shall file written notice of that amount with the Court. If the parties are unable to agree on the total amount, they should file motions to be determined in the first instance by the Magistrate Judge.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL,
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.; MICHAEL RUCKER; MICHAEL BUTLER; MERONEY ENTERTAINMENT, INC.; THE PLEASURE PALACE, INC.; CAROUSEL AMUSEMENT CENTER, INC.; DAWN PIERCE; and ELIZABETH MARTZ	)	
v.	)	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMITT TURNER, Chief of Police and JERRY C. PENDERGRASS; 822 CORPORATION; and 421 CORPORATION	)	Consolidated with 3-97-1176
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE	)	

TO: Honorable Todd J. Campbell,. United States District Judge

REPORT AND RECOMMENDATION

I. BACKGROUND

(Entered Oct. 1, 2002)

On August 19, 1997, the Council of the Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This chapter, and subsequently enacted amendments to it, required "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit. The August 19, 1997, ordinance established an effective date of November 1, 1997, and allowed existing businesses 120 days to apply for a license and entertainers 45 days to apply for a permit. Sections .0130(F) and .060(B) of Chapters 6.54. *See* Exhibit C to Docket Entry No. 11.

The plaintiffs in this action are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individuals dancers who perform at such establishments. The plaintiffs in the first filed case ("the Deja Vu plaintiffs") filed this action under 42 U.S.C. § 1983, on October 17, 1997, against the Metropolitan Government of Nashville and Davidson County and Emmitt Turner in his official capacity as Chief of Police of the Metropolitan Police Department, seeking a preliminary injunction, permanent injunction, and declaratory judgment to determine the constitutionality of Chapter 6.54. On November 10, 1997, the plaintiffs in the second listed action (the "Pendergrass plaintiffs") moved to intervene as plaintiffs in this case, and commenced their own lawsuit, alleging similar harms, and seeking a preliminary

injunction. By order entered December 8, 1997 (Docket Entry No. 23), the two actions were consolidated, mooting the motion of the Pendergrass plaintiffs to intervene, and enjoined the defendants from enforcing any of the provisions of Chapter 6.54 because the ordinance failed to provide for prompt judicial review of decisions by the Sexually Oriented Businesses Licensing Board. The Metropolitan Council subsequently amended the ordinance to correct the defects upon which the preliminary injunction was based, and, by order entered December 3, 1998 (Docket Entry No. 76), the injunction was dissolved. The dissolution of the injunction was appealed to the Court of Appeals for the Sixth Circuit (Docket Entry No. 94).

On December 17, 1998, the plaintiffs filed their second motions for a preliminary injunction (Docket Entry No. 80 and 82), asserting claims previously preserved and not raised in the first motions. In response (Docket Entry No. 104), the defendants stated that certain sections of the ordinance would be severed, that other sections would be enforced "subject to a limiting construction," and that, accordingly, enforcement of the remaining constitutional provisions should be permitted. On March 23, 1999, the defendants filed a notice that 92 amendments to the ordinance had been enacted (Exhibit E to Docket Entry No. 134), and argued that the constitutional infirmities asserted by the plaintiffs were moot in light of the amendments (Docket Entry No. 136).

The Court granted the plaintiffs leave to file a motion for interim attorneys fees based on their status as a prevailing party on their first motion for preliminary injunction, which served as a catalyst for subsequent amendments to the ordinance, Docket Entry No. 152, and

the plaintiff filed a motion seeking an award of attorney fees (Docket Entry No. 158), in the amount of $258,536.75, and costs and expenses of $56,726.79, for the Deja Vu plaintiffs and attorneys fees in the amount of $38,231.25, and costs and expenses of $4,342.50 for the Pendergrass plaintiffs, for a total request of $357,837.29.

By order entered October 4, 1999 (Docket Entry No. 189), the Court granted the plaintiffs' second motions for preliminary injunction, finding that the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts were unconstitutional. Because the Court found that the offending provisions could not be severed from the ordinance as a whole, the Court enjoined the defendants from enforcing Chapter 6.54 in its entirety.

By order entered December 23, 1999 (Docket Entry No. 199), the preliminary injunction was made permanent and the defendants were permanently enjoined from enforcing Chapter 6.54. Accordingly, the Court ordered that "the applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of conclusion of this litigation by entry of this order." Pursuant to that order, the plaintiffs filed their second motion for attorney fees (Docket Entry No. 201).

The defendants appealed the December 23, 1999, order (Docket Entry No. 208), and the plaintiffs filed a cross-appeal (Docket Entry No. 212) of the portion of the December 23, 1999, decision, finding constitutional the definition of "sexually oriented business/establishment" and the no touch/buffer zone provision, along with the order of the Magistrate Judge (Docket Entry No. 56), granting in significant part the defendants' motion for a

protective order and denying discovery requested by the plaintiffs.

By order entered May 24, 2000 (Docket Entry No. 228), the Court denied the defendants' motion to vacate or dissolve the injunction under Rule 60(b) of the Federal Rules of Civil Procedure because of amendments to the ordinance. The defendants filed a notice of appeal from that order (Docket Entry No. 233).

By mandate issued December 6, 2001, the Court of Appeals affirmed in part and reversed in part. Specifically, the Court of Appeals affirmed the District Court's finding that the definitions of "sexually oriented business establishment" and "sexually oriented theater" were not unconstitutionally overbroad, and that the no touch/buffer zone provision was constitutional, but the Court found that the unconstitutionally overbroad definition of "sexually oriented" could easily be severed from the ordinance. The Court also found that the civil disabilities provision, the disclosure provision, and the fee amounts were constitutional, reversing the District Court's finding that such provisions were unconstitutional. *Deja Vu v. Metropolitan Government*, 274 F.3d 377 (6th Cir. 2001). The Court reversed the District Court's finding that the judicial review procedures were constitutional, and remanded with instructions that the injunction against enforcement of the ordinance should remain until the constitutional problems with the definition of "sexually oriented" and the judicial review procedures are corrected. Finally, the Court of Appeals declined to rule on the discovery issue raised by the plaintiffs since the District Court had not reviewed the order of the Magistrate Judge, and agreed with the defendants' characterization of their appeal of the District Court's denial of

the Rule 60(b) motion as a "procedural misstep." *Id.* at 402.

On January 7, 2002, the plaintiffs filed their third motion for attorney fees, requesting an additional $264,504.37, in fees and expenses (Docket Entry No. 240).

Rehearing and rehearing en banc were denied by the Court of Appeals on February 5, 2002, and certiorari was denied by the United States Supreme Court on May 13, 2002.[1]

II. DISCUSSION

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, provides that in civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The United States Supreme Court has instructed the courts to calculate attorney fees under the "lodestar" method by which the number of hours reasonably expended by the attorney are multiplied by the attorney's reasonable hourly rate. *Blanchard v. Bergeron*, 489 U.S. 67, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). There is a strong presumption that the figure so calculated represents a reasonable fee, *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), and, although the defendants may dispute and/or question the evidence put

[1] On June 12, 2002, the plaintiffs filed their fourth motion for attorney fees (Docket Entry No. 256), requesting an additional award of fees in the amount of $48,980.03. That motion will be addressed in a separate Report and Recommendation.

forth by the plaintiffs in support of the hours worked and rates claimed, "[a] request for attorney's fees should not result in a second Major litigation." *Hensley*, 461 U.S. at 436. Moreover, although an award of attorney fees under section 1988 is discretionary,[2] "in the absence of special circumstances a district court not merely 'may' award but *must* award fees to the prevailing plaintiff. . . ." *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272 (6th Cir. 1991) (quoting *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) (citing *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)) (emphasis in original).

A. Hourly Rates

To calculate the amount of reasonable attorneys fees to which a prevailing party is entitled, the Court must first determine the lodestar amount, which is based on the number of hours reasonably expended on the litigation, multiplied by the reasonable hourly rate of the plaintiffs' attorneys. *Hensley*, 461 U.S. at 434. "Reasonable fees under § 1988 are to be calculated according to the prevailing market rates in the relevant community," *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891

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[2] *See Hensley*, 461 U.S. at 437. *See also Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 274 (6th Cir. 1983) ("the district curt judge who presided over a case is in the best position to evaluate the reasonableness of fee requests, both in terms of the number of hours spent and reasonable hourly rate of compensation"); *Blanchard*, 489 U.S. at 96 ("It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case").

(1984), and should not exceed what is necessary to encourage lawyers within the relevant community to undertake legal representation. *Coulter v. State of Tennessee,* 805 F.2d 146, 149 (6th Cir. 1986), *cert. denied,* 482 U.S. 914 (1987); *Blum* 465 U.S. at 897. The fee-shifting statutes are designed to provide reasonable compensation, to the end that injured parties will be able to obtain adequate legal representation when there has been a violation of specific, federal laws, *Delaware Valley,* 478 U.S. at 565, but are not necessarily the equivalent of the rates charged well-to-do-clients. *Coulter,* 805 F.2d at 149. *But see Hensley,* 461 U.S. at 435 (the successful civil rights plaintiff is entitled to a fully compensatory feel comparable to compensation by a fee-paying client). Reasonable fees under section 1988 should be calculated according to the market rates in the relevant community. *See Presley v. Haeger,* 977 F.2d 295, 299 (7th Cir. 1992) ("Fee litigation under § 1988 depends on what the market rate is rather than what litigants and judges think it ought to be").

Five attorneys of record participated in this consolidated action on behalf of the plaintiffs, Bradley J. Shafer, Michael Pleasants, Andrew Wilkins, H. Louis Sirkin, and John Herbison. The work of other attorneys in the law offices have also been included in the plaintiffs' request for fees, and the defendants have not objected to their fees simply because they are not attorneys of record or because the plaintiffs have not presented any information about them. Therefore, no reduction is made for the fees of these lawyers.[3]

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[3] Specifically, Scott M. Goldstein (SMG), charging $125.00 per hour; Allan S. Rubin (ASR) charging $150.00 per hour; and Amy Burgess (AIB), charging $125.00 per hour.

It should be noted that the plaintiffs have not listed all of the hours that they worked.[4] They have also not sought an upward adjustment. Finally, Mr. Herbison is on a monthly retainer and, although he was local counsel for the Pendergrass plaintiffs and performed accordingly, he has not requested attorney fees for his services. *See* Docket Entry No. 160.[5]

In their first two motions for attorney fees, Mr. Shafer and Mr. Pleasants, attorneys for the Deja Vu plaintiffs, attest in their affidavits (Docket Entry Nos. 203 and 205), that their hourly rate is $175.00, and that Mr. Wilkins' hourly rate is $125.00. Mr. Sirkin; counsel for the Pendergrass plaintiffs, attests that his hourly rate is $225.00, but his time sheet indicates that his hourly rate is $200.00 (Docket Entry No. 205). *See Hensley,* 461 U.S. at 433 ("[h]ours that are not properly billed to one's *client* are not properly billed to one's *adversary*" (emphasis in original). The defendants do not object to these hourly rates, and the Court finds $175.00 is in accord with the prevailing market rates in Nashville for attorneys with the same background and experience as Mr. Shafer and Mr. Pleasants, and that $125.00 is in accord with the prevailing market rates in Nashville for associates of Mr. Wilkins' experience. The Court accepts the $200.00 hourly rate that Mr. Sirkin actually charged the plaintiffs.

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[4] *See, e.g.,* Docket Entry No. 241, at 8, in which the plaintiffs explained that their requests do not include approximately $80,000.00 in fees and expenses "either not billed initially or excised afterward by use of reasonable discretion and judgment. . . ."

[5] By order entered June 14, 2002 (Docket Entry No. 260), Michael Pleasants was substituted for Mr. Herbison as counsel for the Pendergrass plaintiffs.

In the third motion for attorney fees, Mr. Shafer raises his hourly fee to $200.00 per hour, and Mr. Wilkins raises his hourly fee to $150.00 hour. In addition, Mr. Sirkin began billing at the rate of $225.00 per hour. The defendants raise no objection to these hourly rates, and they should be approved.

B. Prevailing Party

The defendants argue that the plaintiffs did not prevail on specific issues to which the work was related or that the specific notation of work performed was "unspecific" in identifying issues sufficient to determine whether or not the plaintiffs were the prevailing party. Accordingly, the defendants assert that, because the plaintiffs' relief was minimal, only costs and attorneys fees attributable to successful claims should be recovered. Because the plaintiffs' billing records are not specific enough to allow for such a calculation, the defendants contend that the costs and expenses related to unsuccessful motions, briefs, or hearings should be deducted from the award of attorney fees.

However, a plaintiff may be considered a prevailing party even if he does not recover 100% of what he claims, *Hamlin v. Charter Township of Flint,* 165 F.3d 420, 437 (6th Cir. 1999). Issuance of a permanent injunction enjoining enforcement of Chapter 6.54 is clearly a significant victory for the plaintiffs. Enforcement of the ordinance remains enjoined, as a practical matter, since the end of 1997. However, the ultimate mandatory changes in the current ordinance will relate to the definition of "sexually oriented," which, under a reading of the Sixth Circuit decision, will be an easy task of severance, and the judicial

review procedures. All other constitutional challenges asserted by the plaintiffs have now been resolved in the defendants' favor.

Although plaintiffs' counsel should not be compensated for attorney hours spent on distinctly different claims based on different facts and legal theories, claims involving a common core of facts and related legal theories should be not be viewed as, discrete claims in determining an award of attorney fees. *Hensley*, 461 U.S. at 435. Thus, the issue is the significance of the overall relief in relation to the hours reasonably expended on the litigation, not, as the defendants suggest, on the ratio of pages in a brief expended on an issue in comparison to the number of constitutional violations explicitly found by the Court as a basis for enjoining an ordinance.

Under *Henley*, when a plaintiff has succeeded on some claims but not others, the Court must look to whether the unsuccessful claims were related to the successful claims, and whether the level of success attained makes the hours reasonably expended a satisfactory basis for making a fee award. *Id.* at 434. The *Hensley* Court explicitly held that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.[6] The result is what matters." 461 U.S. at 435. Only when the plaintiff "has failed to prevail on a claim that is distinct in all respects from his successful

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[6] *See also Hensley*, 462 U.S. at 448 (Brennan, J., concurring in part and dissenting in part) ("courts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief").

claims" should the hours spent on the unsuccessful claim be excluded in considering the amount of a reasonable fee. *Id.* at 440. The Supreme Court specifically rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon," because "[s]uch a rationale provides little aid in determining what is a reasonable fee in light of all the relevant factors," and because it is not "necessarily significant that a prevailing plaintiff did nor receive all the relief requested." *Id.* at 435 n.11.

Likewise, the Court of Appeals for the Sixth Circuit has held that attorney fees should not be reduced based on a "simple ratio of successful claims to claims raised" *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (citing *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993). The Sixth Circuit has enunciated the following standard:

> The question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief obtained. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169 (6th Cir. 1990).

The most significant consideration is the degree of the plaintiffs' success. *Hensley*, 416 at 434, 436, 440. The Supreme Court has emphasized the necessity for the Court to consider the extent of the success and the amount of the fee award. *Id.* at 438, one hand, the Court instructed

that hours spent on an unsuccessful claim should be excluded if such a claim is distinct in all respects from the successful claim. On the other hand, the Court instructed that a court should not reduce the fees of a plaintiff, who wins substantial relief, if the claims are related if the court does not rule in the plaintiff's favor on each contention. *Id.* at 424.

The plaintiffs argue that the claims in this case are so related that they cannot be severed for the purpose of an attorney fee award. The defendants argue that the claims are, in fact, distinct and can be separated out. The Court agrees with the defendants to a significant extent. Just as the claims in *Hensley*, the grounds asserted by the plaintiffs in this case to hold the ordinance unconstitutional are discrete claims, including lack of judicial review, definitions of "sexually oriented, the civil disabilities provision, the disclosure provision, the fee amounts, and the no touch/buffer zone provision. The plaintiffs have prevailed on the claim of lack of adequate judicial review and the "sexually oriented" definitions. They have not prevailed on their other claims. What *Hensley*, specifically disapproved was the easiest methodology of establishing a ratio of successful and unsuccessful claims to the total of the requested fees. The plaintiffs should not be awarded attorney fees related to claims upon which they did not prevail. However, the Court also agrees with the plaintiffs to the extent that there are circumstances in which it is impossible to separate out with a fine tooth comb the work on one contention advanced from another.

Thus, although hours not reasonably expended will not be compensated, *Hensley*, 461 U.S. at 434, the plaintiffs' attorney is entitled to recover a "fully compensatory

fee" that will not be reduced "simply because the plaintiff failed to prevail on every contention raised in the lawsuit."

C. Catalyst Theory

The defendants argue that, under *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Services*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), the plaintiffs should not be entitled to any attorney fees that resulted in the defendants' voluntary amendments to the ordinance. In *Buckhannon*, the Supreme Court held that it is not sufficient that a lawsuit was a catalyst for legislative action, but that there must be court-ordered relief. There has been court-ordered relief in this case. The defendants are correct that, under *Buckhannon*, attorney fees incurred that were the catalyst[7] for the amendments to the ordinance that were not court ordered cannot be awarded to the plaintiffs. The plaintiffs argue that, although there has been no judicial ruling on issues such as the buffer zone and the civil disability provision of the ordinance including "crimes of moral turpitude," the holding of the Sixth Circuit in finding the current amended version of the ordinance on the buffer zone and civil disability constitutional shows that the Court of Appeals would not have found the original version to have been constitutional. However, it is that circumstance which *Buckhannon* specifically addresses. Therefore, the Court has reviewed the plaintiffs' request for an award of attorney fees and has attempted to exclude work performed that did not result in entry of a preliminary or

[7] The defendant argues that this lawsuit was not, in fact, the Catalyst for the amendments. However, it is not necessary to address this issue because of the inapplicability of the catalyst rule.

permanent injunction and that was not part of the holding by the Court of Appeals.

D. Hours Expended

After a determination of the hourly rate, the Court must then determine, under *Hensley*, whether the number of hours claimed are reasonable.

The defendants first argue that the plaintiffs' first application for interim fees was untimely, since the application was not made in accord with Rule 54(d) of the Federal Rules of Civil Procedure or Local Rule 13(e) and was not made until after the first preliminary injunction was dissolved by order entered December 1, 1998. However, as the defendants note, this argument was raised in opposition to the plaintiffs' motion to file an application for interim fees. The motion was granted by order entered April 16, 1990 (Docket Entry No. 152), after considering the defendants' arguments.

The defendants argue that only $58,550.77 for Mr. Shafer, $10,966,96 for Mr. Pleasants, and $2,587.50, for a total of $72,105.23, should be awarded as attorney fees on the plaintiffs' first application for fees. The defendants have not challenged any fees incurred by the plaintiffs from May 14, 1997, until December 4, 1997. The defendants' challenges fall into three primary categories (1) work performed on issues upon which the plaintiffs did not prevail; (2) work performed on issues related to the writ of certiorari and prompt judicial review because the preliminary injunction was dissolved; and (3) "unspecific" work, i.e., work performed but the plaintiffs' time sheets are not specific enough to determine what the research or other work was. The defendants also challenge any work

performed related to discovery, pointing out that the plaintiffs were not successful in their discovery requests. *See* order entered October 22, 1998. It appears to the Court that some of the entries for discovery were related to the plaintiffs' responding to discovery. In addition, although the defendants prevailed in all but one respect in its motion for a protective order (Docket Entry No. 48), the Court did grant the plaintiffs minimal relief. Much of the work performed relating to discovery, specifically that work related to the defendants' motion for a protective order, should be disallowed.

The defendants also challenge any work performed by plaintiff's attorneys on the *Kallstrom* issue of disclosure. Although the defendants have related that it assured the plaintiffs that the information contained in the applications for licenses and permits would not be disclosed under the authority of *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), the plaintiffs were apparently unpersuaded that *Kallstrom* provided sufficient authority. By order entered April 30, 1999 (Docket Entry No. 156), the Court directed that all personal information contained in applications of entertainers for permits be treated as submitted to the defendants under seal during the pendency of the case and not be released until the *Kallstrom* procedures have been afforded the applicants and by leave of Court. Although by agreement of the defendants, the plaintiffs did obtain judicial relief on this issue and attorney fees for work performed on this issue until April 30, 1999, should be included in the fees awarded.

The Court agrees with the defendants that attorney fees for work performed on matters upon which the plaintiffs did not prevail should not be awarded. However, the plaintiffs ultimately prevailed on the judicial review issue

and fees for work related to that issue should be awarded. The most problematic portion of the plaintiffs' fee request is for the work performed that is listed simply as "research" or other equally unspecific characterizations. The Court credits Mr. Shafer with setting forth with some specificity the issues about which work was performed in many entries. As the Supreme Court observed in *Hensley*, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." 461 U.S. at 436.

The following fees should be disallowed:

a. First Motion for Fees (Docket Entry No. 158)*

(1) Bradley Shafer (Docket Entry No. 161)

1/12/98: $300.00 disallowed. Although this entry includes other matters than "research for additional criminal disability issues," which the Court hereby disallows, the plaintiffs did not apportion the 3.8 hours among the matters noted.†

2/03/98: $445.00 disallowed.

2/10/98: $595.00 disallowed.

3/27/98: $402.50 disallowed.

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* Other filings related to this motion are Docket Entry Nos. 158-164, 170, 183-184, and 191.

† The Court notes that the identity of Mr. J. St. John is unclear. The defendant has not raised any objection about any conversations or meetings with Mr. St. John, so the Court will not address the issue.

4/06/98: $200.00 disallowed. Again, the plaintiffs did not apportion the time for "work on distance arguments," which is hereby disallowed.

4/28/98: $402.50 disallowed.

4/30/98: $560.00 disallowed.

5/3/98: $250.00 disallowed. It is not possible to determine how much of the entry was devoted to distance issues.

5/12/98: $650.00 disallowed.

5/13/98: $875.00 disallowed.

5/14/98: $275.00 disallowed. The defendants did not challenge approximately $100.00.

5/15/98: $525.00 disallowed.

5/21/98: $350.00 disallowed.

5/22/98: $600.00 disallowed.

5/26/98: $245.00 disallowed

5/26/98: $375.00 disallowed.

5/27/98: $375.00 disallowed.

5/28/98: $375.00 disallowed.

6/2/98: $300.00 disallowed. It is not clear whether "words objected to as vague" include "sexually oriented." The $300.00 is an approximate reflection of the research on dancer distance.

6/5/98: $100.00 disallowed to reflect research on dancer distance.

6/8/98: $912.50 disallowed.

6/9/98: $812.50 disallowed.

6/10/98: $625.00 disallowed.

6/11/98: $600.00 disallowed. The defendants did not challenge the $300.00 balance.

6/12/98: $650.00 disallowed.

6/13/98: $315.00 disallowed.

6/24/98: $250.00 disallowed.

7/1/98: $105.00 disallowed.

7/13/98: $762.50 disallowed.

7/16/98: $600.00 disallowed.

7/17/98: $325.00 disallowed.

7/20/98: $700.00 disallowed. The plaintiffs have not apportioned the time spent on research, which should be disallowed, and the time spent working on discovery responses,

7/22/98: $250.00 disallowed.

7/23/98: $927.50 disallowed. This is a perplexing entry since refers to "work on discovery to State and research for summary judgment arguments." There was no summary judgment motion filed and the State is not a party.

7/23/98: $475.00 disallowed. The defendants did not object to the balance of $237.50.

7/29/98: $35.00. Time spent talking to a reporter should be disallowed.

7/30/98: $262.50 disallowed.

7/31/98: $168.75 disallowed. The defendants did not object to the balance of $168.75.

8/4/98: $291.56 disallowed. The defendants did not object to the balance of $145.83.

8/5/98: $450.00 disallowed.

8/6/98: $400.00 disallowed.

8/10/98: $350.00 disallowed.

8/14/98: $650.00 disallowed.

8/20/98: $250.00 disallowed.

8/21/98: $418.50 disallowed. The defendants did not object to the balance of $418.50.

8/24/98: $400.00 disallowed. The defendants did not object to the balance of $400.00.

8/25/98: $250.00 disallowed, reflecting work on criminal disability.

8/26/98: $312.50 disallowed. The defendants did not object to the balance of $312.50.

8/27/98: $541.67 disallowed. The defendants did not object to the balance of $270.83.

8/28/98: $312.50 disallowed. The defendants did not object to the balance of $312.50.

9/1/98: $950.00 disallowed.

9/2/98: $887.50 disallowed.

9/3/98 through 9/26/98: All charges disallowed. *See* Docket Entry No. 161, at 21-23.

9/28/98: $287.50 disallowed.

9/29/98: $287.50 disallowed.

9/30/98: $375.00 disallowed.

10/6/98: $375.00 disallowed.

10/8/98: $400.00 disallowed, reflecting research on disclosures and distance.

10/12/98: $625.00 disallowed.

10/14/98: $900.00 disallowed.

10/22/98: $887.50 disallowed.

10/23/98: $812.50 disallowed.

10/26/98: $837.50 disallowed.

10/26/98: $300.00 disallowed.

10/27/98: $495.00 disallowed.

10/28/98: $862.50 disallowed.

10/28/98: $1095.00 disallowed.

10/29/98: $1137.50 disallowed.

10/29/98: $500.00 disallowed.

10/30/98: $662.50 disallowed.

11/1/98: 490.00 disallowed.

11/03/98: $822.50 disallowed.

11/03/98: $975.00 disallowed.

11/9/98: $927.50 disallowed.

11/16/98: 455.00 disallowed.

11/19/98: $595.00 disallowed.

11/22/98: $402.50 disallowed.

11/23/98: $662.50 disallowed.

12/03/98: $227.50 disallowed.

12/04/98: $287.50 disallowed.

12/07/98: $300.00 disallowed.

12/12/93: $2,030.00 disallowed.

12/13/98: $2310.00 disallowed.

12/15/93: $1000.00 disallowed.

12/17/98: $312.50 disallowed.

12/18/93: $287.50 disallowed.

12/30/98: $62.50 disallowed.

1/4/99: $375.00 disallowed.

1/5/99: $375.00 disallowed.

1/6/98: $1,172.50 disallowed.

1/8/98: $500.00 disallowed.

1/14/99: $787.50 disallowed.

1/18/99: $500.00 disallowed, assuming that research on "word definitions" may relate to the overbreadth of "sexually oriented."

1/18/99: $540.83 disallowed. The defendants did not challenge the balance of $104.17.

1/19/99: $912.50 disallowed.

1/20/99: $1320.00 disallowed.

1/20/99: $250.00 disallowed.

(2) Michael F. Pleasants (Docket Entry No. 164)

The defendants object to all of the charges set forth by Mr. Pleasants. *See* Attachment 4 to Docket Entry No. 159, as lacking specificity or relating to any issue upon which the plaintiffs did not prevail. The following fees should be disallowed:

9/28/98: $87.50 disallowed.

10/8/98: $43.75 disallowed.

10/30/98: $200.00, allocated as relating to the discovery ruling, disallowed.

(3) H. Louis Sirkin (Docket Entry No. 158)

The following hours shall be disallowed:

11/19/98: .25

11/20/98: 1.5

11/20/98: .5

12/15/98: 1.1

4/30/99: 2.0

b. Second Motion For Fees (Docket Entry No. 201)[10]

(1) Bradley J. Shafer (Docket Entry No. 203)

3/15/99: $600.00 disallowed.

3/17/99: $187.50 disallowed

3/18/99: $350.00 disallowed.

3/22/02: $255.00 disallowed

4/2/99: $800.00 disallowed.

4/5/99: $700.00 disallowed.

4/6/99: $137.50 disallowed.

4/7/99: $712.50 disallowed.

4/8/99: $687.50 disallowed of $2187.50.

4/8/99: $700.00 disallowed of $900.00.

4/9/99: $212.50 disallowed of $812.50.

(2) Michael F. Pleasants (Docket Entry No. 204)

The attorney fees set forth are either reasonable and, in some cases, it was impossible to parse out what work performed was on matters upon which the plaintiffs prevailed and matters upon which they did not prevail.

[10] Other filings related to this motion are Docket Entry Nos. 202-207, 214-215, and 229.

(3) H. Louis Sirkin (Docket Entry No. 205)

The attorney fees set forth are either reasonable and, in some cases, it was impossible to parse out what work performed was on matters upon which the plaintiff prevailed and matters upon which they did not prevail.

c. Third Motion for Fees (Docket Entry No. 240)[11]

The defendants apparently argue that the plaintiffs should only be entitled to $19,152.50, which reflects the work performed on the issue of judicial review upon which the plaintiffs prevailed on appeal.

That amount should be awarded. The question, however, remains whether the remaining fees requested for work on the appeals or any portion thereof is properly subject to an attorney fee award. Although the defendants scoff at what they contend was the limited success of the plaintiffs on the issue relating to the definition of "sexually oriented," since the Sixth Circuit held that such term can be easily severed from the ordinance, the bottom line is that the defendants had not severed the term from the ordinance, forcing the Court of Appeals to address the issue. The Court commented that "we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. . . . For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must." 274 F.3d at 389. The Court further noted that "these constitutional issues would never have

[11] Other filings related to this motion are Docket Entry Nos. 241-242, 244, and 253.

arisen had the Ordinance been written more clearly. . . . Whatever difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities." *Id.* at 388 n.2.

Whether or not the definition of "sexually oriented" or the severability of the term from the ordinance was an issue that should have merited work by either side, the fact is that the Sixth Circuit resolved it in favor of the plaintiffs and they should be compensated for that work.

Similarly, the plaintiffs should be compensated for work performed on issues of mootness and standing. The issue of whether the plaintiffs should be compensated for any work performed relating to the disclosure provisions is less clear. The defendants argued, inter alia, that information in the applications and permits is protected under *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). The Sixth Circuit agreed, while rejecting three other arguments made by the defendants for the protection of such information. It is not insignificant for the plaintiffs that the Sixth Circuit has spoken definitively on this issue.

The Court further agrees with the plaintiffs that much of the work on appeal on the issues upon which the plaintiffs prevailed had to have been intertwined with work on issues upon which the plaintiffs did not prevail, and thus it is impossible to accurately apportion their time. For instance, time spent reviewing the defendants' filings or preparing for oral argument cannot easily be apportioned among the issues involved.

In an attempt to follow the *Hensley* dictates, two-thirds (⅔) of the fees requested in Mr. Shafer's affidavit (Docket Entry No. 242) and Mr. Shafer's attached

summary after the 4/3/00 entry and two-thirds (⅔) of the fees listed in the attached summary on behalf of the Pendergrass plaintiffs should be disallowed, with the exception of the 5/9/00 entry for $1,575.00, which should be allowed.

If this Report and Recommendation is adopted, the plaintiffs will have prevailed substantially on their requests for attorneys fees. Therefore, the amount of $31,527.50 requested by the Deja Vu plaintiffs for work on their requests for attorneys fees should be allowed.

E. Expenses

The defendants challenge the plaintiffs' request for an award of costs and expenses to the extent that they seek non-reimbursable expenses, such as "Federal Express or delivery services, meals, travel, computer research, postage and miscellaneous office expenses." Docket Entry No. 222, at 8. The plaintiffs' billing records are replete with charges for overnight delivery, without an explanation for why overnight delivery wash necessary. All such overnight delivery and delivery services charges should be disallowed.

The plaintiffs do not respond to the defendants' contention that the vast majority of their requested expenses should be disallowed. The plaintiffs' request for an award of expenses should be denied at this time, with leave to the plaintiffs to refile a motion for an award of expenses, responding to the defendants' argument, and explaining in detail why the expenses are properly reimbursable.

III. RECOMMENDATION

For the reasons stated above, the plaintiffs' first three motions for an award of attorney fees should be granted. However, the amounts listed above should be disallowed, and the amounts sought as expenses should be denied, with leave to the plaintiffs to refile a motion seeking only expenses with a detailed explanation of the necessity and propriety of such expenses.

Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this Report & Recommendation to which objection is made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully Submitted,

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	]	
	]	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE et al.	]	No. 3-97-1176
	]	Judge Higgins

ORDER

(Entered Dec. 23, 1999)

In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.[1,2]

The preliminary injunction heretofore issued is herewith made a permanent injunction.

Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code.

The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of the conclusion of this litigation by the entry of this order.

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[1] See memorandum and order (entered October 4, 1999; Docket Entry Nos. 188-189) granting motions for preliminary injunction.

[2] There is no claim by the plaintiffs for money damages under 42 U.S.C. § 1983. Applications for interim attorneys' fees are now pending before the Magistrate Judge.

The entry of this order shall constitute the final judgment in this action.[3]

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
12-21-99

[3] The plaintiffs' motion to show cause (filed June 15, 1999; Docket Entry No. 167) is denied in its entirety. The defendants' motion (filed July 2, 1999; Docket Entry No. 175) to strike is denied as moot. The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike is denied as moot.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	]	
	]	
v.	]	No. 3-97-1066
	]	No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE et al.	]	Judge Higgins

ORDER

(Entered Oct. 4, 1999)

In accordance with the memorandum contemporaneously entered, the plaintiffs' motions (filed December 17, 1998; Docket Entry Nos. 81 and 83) for a preliminary injunction are granted.[1]

Accordingly, the defendants are enjoined from enforcing Chapter 6.54 of the Metropolitan Code, pending the adjudication of these cases on the merits and entry of a final judgment.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99

[1] The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) is granted insofar as the notice relates to the plaintiffs' second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. However, the plaintiffs' motion is denied in all other respects.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	]	
v.	]	No. 3-97-1066
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	]	No. 3-97-1176
	]	Judge Higgins

MEMORANDUM

(Entered Oct. 4, 1999)

The plaintiffs in this case are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. On August 19, 1997, the Council of The Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This Chapter, and subsequently enacted amendments to it, require "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The initial plaintiffs in this case, Deja Vu of Nashville, Inc.; Michael Rucker; Michael Butler; Meroney Entertainment, Inc.; The Pleasure Palace, Inc.; Carousel Amusement Center, Inc.; Dawn Pierce; and Elizabeth

Martez,[1] filed this action on October 17, 1997, against The Metropolitan Government of Nashville and Davidson County, and Emmitt Turner, Chief of Police of the Metro Police Department, in his official capacity, seeking a preliminary injunction, permanent injunction and declaratory judgment determining the constitutionality of Chapter 6.54. *See also,* motion (filed October 17, 1997; Docket Entry No. 2) for issuance of a preliminary injunction. On December 1, 1997, a hearing was held before the Honorable John T. Nixon on the motions (Docket Entry Nos. 2 and 11) for a preliminary injunction. On the basis that the ordinance did not provide the proper procedural requirements for a prior restraint of expression protected by the First Amendment, the Court enjoined the defendants from enforcing the ordinance. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.). After the Metro Council amended the ordinance to correct the defects upon which the preliminary injunction was based, the Court dissolved the injunction. Order (entered December 3, 1998, Docket Entry No. 76) (Nixon, J.).[2]

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[1] Mr. Jerry C. Pendergrass, The 822 Corporation, and 421 Corporation subsequently initiated their own action (No. 3-97-1176) also seeking preliminary injunction, and sought to intervene in this action. Motion (filed December 17, 1998; Docket Entry No. 11) to intervene and for preliminary injunction. The Court consolidated the actions, deemed the Pendergrass et al. motion to intervene moot, and treated the plaintiffs' motions (Docket Entry Nos. 2 and 11) jointly. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.).

[2] On December 16, 1998, the plaintiffs filed a motion (Docket Entry No. 77) for a stay pending appeal and on December 31, 1998, filed a notice of appeal (Docket Entry No. 94). Judge Nixon recused himself and the case was reassigned to The Honorable Aleta Trauger. *See* order (Docket Entry No. 97) (Nixon, J.). A hearing on the motions for stay

(Continued on following page)

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction, which is now before the Court,[3],[4] is based on claims previously reserved by the plaintiffs. *See* plaintiffs' motion (Docket Entry No. 2) for preliminary injunction.[5] In their second

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pending appeal and for preliminary injunction was held on January 13, 1999, and the motion for stay was denied. Order (entered January 26, 1999; Docket Entry No. 114) (Trauger, J.). The motions (Docket Entry Nos. 81 and 83) for preliminary injunction were set for further hearing on January 27, 1999. Order (entered January 26, 1999; Docket Entry No. 115) (Trauger, J.). By order (Docket Entry No. 109) entered January 20, 1999, the Pendergrass et al. motion (filed December 16, 1998; Docket Entry No. 80) to file an amended complaint was granted, and the amended complaint (Docket Entry No. 121) was filed January 20, 1999.

[3] By order (Docket Entry No. 122) entered February 3, 1999, Judge Trauger recused herself and the case was reassigned to Judge Nixon. By order (Docket Entry No. 124) entered February 18, 1999, Judge Nixon returned the case to the clerk for reassignment. The case was assigned to this Court.

[4] Also before the Court is the plaintiffs' memorandum (filed December 17, 1998; Docket Entry No. 84) in support; the motion (filed December 17, 1998; Docket Entry No. 81) of Jerry Pendergrass and The 822 Corporation for preliminary injunction and their memorandum (Docket Entry No. 82) in support; the plaintiffs' supplemental brief (filed December 31, 1998; Docket Entry No. 96) in support of their second motion for preliminary injunction; the defendants' memorandum (filed January 8, 1999; Docket Entry No. 104) in opposition; the plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111); the defendants' response (filed January 22, 1999; Docket Entry No. 112); and the response (filed January 22, 1999; Docket Entry No. 113) of Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

[5] Also before the Court is the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) with attached letters dated May 26, 1999, from the Sexually Oriented Business Licensing Board, informing Metro News c/o Jerry Pendergrass; Madam X c/o C.L. Steele; Purple Onion II c/o C.L. Steele; Purple Onion I c/o C.L. Steele; Ken's Gold Club c/o Ken Meroney; and Mr. Mike Rucker c/o Deja Vu; that their applications for sexually oriented business licenses have been approved; the plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike

(Continued on following page)

motion, the plaintiffs contend that, both facially and as applied, Chapter 6.54 violates the First and Fourteenth Amendments to United States Constitution. The plaintiffs also assert that the defendants are collaterally estopped from relitigating the constitutionality of some provisions of the ordinance which were present in a predecessor ordinance to Chapter 6.54, and which the Court found unconstitutional in *Ellwest Stereo Theater v. Boner,* 718 F. Supp. 1553 (M.D. Tenn. 1989) (Higgins, J.). In their motion (Docket Entry No. 81) Mr. Pendergrass and The 822 Corporation reassert their earlier claim that the civil disabilities provision of the ordinance are unconstitutional. *See* motion (Docket Entry No. 81) for preliminary injunction and memorandum (Docket Entry No. 82) in support. Accordingly, the plaintiffs seek declaratory relief in the form of a preliminary injunction under Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202.

The Court has jurisdiction over this matter under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1334(3) and §§ 2201 and 2202. The motions were heard on oral testimony from April 13 to April 16, 1999. For the reasons set forth below, the plaintiffs' motions for preliminary injunction shall be granted.

I.

The Court must consider the following four factors in determining whether or not to grant a preliminary injunction:

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defendants' notice of filing; their brief (Docket Entry No. 166) in support; and the defendants' response (filed June 28, 1999; Docket Entry No. 174).

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 653 (6th Cir. 1996), *cert. denied,* 519 U.S. 807, 117 S.Ct. 49, 136 L.Ed.2d 12 (1996)). The general rule with respect to these factors is that courts are not to give greater weight to any one factor in particular, but are to balance them. *Id.*

When a preliminary injunction is sought because rights guaranteed by the First Amendment are potentially at stake, the first factor, likelihood of success on the merits, will be determinative. *Id.* The Supreme Court of the United States has stated that "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2573, 2690, 49 L.Ed.2d 547, 565 (1976) (plurality) and *citing Newsom v. Norris,* 888 F.2d 371, 378 (6th Cir. 1989) for the proposition that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Therefore, "to the extent that [a party] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Id.* (citation omitted). Additionally, because "'it is always in the public interest to prevent the violation of a party's constitutional rights,'" harm to the public interest is also

established by showing a substantial likelihood of success on the merits. *Id.* (quoting *G & V Lounge. Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994)).

II.

Sexually explicit, non-obscene performances and materials are expressions protected by the First Amendment to the United States Constitution. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310, 326 (1976). However, society is considered to have less interest in protecting this kind of expression than in protecting other kinds of speech. *Id.* Consequently, sexually explicit expression falls within the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991); *see also, Richland Bookmart. Inc. v. Nichols,* 137 F.3d 435, 438 (6th Cir. 1998). Accordingly, the type of expression which Chapter 6.54 of the Metropolitan Code seeks to regulate is on the "outer perimeters" of expression protected by the First Amendment. *Id.*

Under the due process requirement of the Fourteenth Amendment to the United States Constitution, laws must clearly define the conduct they proscribe. *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227 (1972). The vagueness of laws that attempt to regulate speech raises "special concerns under the Federal Constitution's First Amendment because of the obvious chilling effect of such regulations on free speech." *Reno v. ACLU,* 521 U.S. 844, 845, 117 S.Ct. 2329, 2332, 138 L.Ed. 874, 876 (1997). Such laws must "give the person of ordinary intelligence a reasonable opportunity to

know what is prohibited, so that he may act accordingly." *Grayned,* 408 U.S. at 108, 92 S.Ct. at 2298, 33 L.Ed.2d at 227. This requirement was explained as follows:

> [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. (footnotes omitted).

In determining whether an ordinance is impermissibly vague, the Court "'must extrapolate its allowable meaning'" while keeping in mind the prohibition on federal courts from construing state statutes. *Id.,* 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228 (quoting *Garner v. Louisiana,* 368 U.S. 157, 174, 82 S.Ct. 248, 257, 7 L.Ed.2d 219 (1961)). In doing so, the Court is "'relegated . . . to the words of the ordinance itself', to the interpretations [other courts] have given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Id.* (quoting *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.E.2d 214, 217 (1971)).

A law will be considered impermissibly vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322, 328 (1926). However, if the meaning of the law is commonly understood, it will not be considered vague. *See United States v. J.T. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). Additionally, the prohibited conduct need not be defined with mathematical precision. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. (1995). Nor is a law vague because it "'requires a person to conform his conduct to an imprecise but comprehensible normative standard.'" *Id.* (quoting *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990)).

In addition, laws which are overbroad, threatening the exercise of First Amendment rights, are unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Recognizing that the application of the overbreath doctrine is "'strong medicine,'" the Supreme Court has employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 192 S.Ct. 3348, 3361, 73 L.Ed.2d 1113, 1130 (1982) (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, 37 L.Ed.2d at 840).

Moreover, the overbreath must be substantial when the protected expression involves conduct and not speech Only. *Id.*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131 (citing *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842). Accordingly, a regulation should not be invalidated for overbreath if it marginally infringes on First Amendment freedoms. *Id.*, 458 U.S. at 770 n.25, 192

S.Ct. at 3362 n.25, 73 L.Ed.2d at 1131 n.25. A law is substantially overbroad if it "reaches a substantial number of impermissible applications," *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132, "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842. Additionally, laws are unconstitutional if they impose restrictions so broad they cause concern over violating the law thereby, creating a "chilling effect" that curtails the availability of non-obscene expression. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *see also, Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962).

A facial challenge can be raised on behalf of others under an exception to the ordinary standing requirements on the basis that a law is substantially overbroad. *Regan v. Time*, 468 U.S. 641, 650, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487, 496 (1984). To prevail on such an attack, the plaintiff must establish that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Assn. v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1, 15 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 784 (1984)).

Due to concerns of federalism that arise when a federal court reviews the constitutionality of a state regulation that is challenged as unconstitutionally vague or overbroad, the reviewing court may not supply a limiting construction in order to save the regulation from being unconstitutional. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (citing *Eubanks v. Wilkinson*,

937 F.2d 1118, 1122 (6th Cir. 1991) for the proposition that "federal 'courts do not rewrite statutes to create constitutionality.'").

Under our First Amendment jurisprudence, protected expressions may be subject to "reasonable time, place or manner" restrictions. *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2461, 115 L.Ed.2d at 511 (1991) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984)). Such a regulation is valid if:

> 1. If it is within the constitutional power of the government;
>
> 2. If it furthers an important or substantial governmental interest;
>
> 3. If the government interest is unrelated to the suppression of free expression; and
>
> 4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[6]

Id., 501 U.S. at 567, 111 S.Ct. at 2461, 115 L.Ed.2d at 512 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968)). The United States Court of Appeals for the Sixth Circuit and other

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[6] In *Clark*, the Supreme Court noted that the four part *O'Brien* test for reviewing the constitutionality of regulations of expressive conduct is really the same test as that for time, place, or manner regulations. *Clark*, 468 U.S. at 298, 104 S.Ct. at 3070, 82 L.Ed.2d at 230. This test asks whether the law is content neutral, is "designed to serve a substantial government interest, and allows alternative avenues of communication." *Richland Bookmart*, 137 F.3d at 440.

courts have applied this test when reviewing the constitutionality of laws regulating sexually oriented businesses. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997); *Ellwest*, 718 F. Supp. at 1562; *Genusa v. City of Peoria*, 619 F.2d. 1203 (7th Cir. 1980).

III.

The plaintiffs do not contest that The Metro government has the constitutional power to enact Chapter 6.54. The plaintiffs contend that Chapter 6.54 is invalid under the second element of the *O'Brien* test because it does not further an important or substantial governmental interest.

The preamble to Chapter 6.54 states that the purpose of the ordinance is "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County." Plaintiffs' exhibit 6. In *Barnes*, the United States Supreme Court upheld Indiana's public indecency statute which was "designed to protect morals and public order," stating that "[t]he traditional police powers of the States is defined as the authority to provide for the public health, safety, and morals and we have upheld such as a basis for legislation." *Barnes*, 501 U.S. at 569, 11 S.Ct. at 2462, 115 L.Ed.2d at 513. Moreover, a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. at 2452, 49 L.Ed.2d at 327.

The evidence reflects that when considering Chapter 6.54, the Metro Council reviewed relevant information and studies from other cities and states evaluating the problems caused by the presence of adult entertainment

establishments. *See* notice (filed April 12, 1999; Docket Entry No. 147).[7] Specifically, the Metro Council relied on studies from Minnesota, Phoenix, Tucson, Arizona, and Austin, Texas. These studies indicated that the secondary effects of adult entertainment establishments threaten the health, safety, and welfare of the citizens where they are located. *Id.*

The Metro Council also relied on information collected in Nashville, including: (1) a report from the Metro Police Department stating that undercover officers observed substantial physical contact between dancers in adult entertainment establishments and the patrons of these establishments and that the undercover officers were successful in soliciting prostitution from several women at various establishments; (2) a report from the Metropolitan Health Department of Nashville and Davidson County of an, inspection of ten adult entertainment establishments on April 16 and 17, 1997, which stated that "the presence of fresh suspected body fluid was evident in six of the ten establishments inspected;" and (3) a Metropolitan Police Department Intelligence Division Report showing that between January 1, 1996, and January 31, 1997, there were 924 dispatched calls[8] to 36 adult entertainment establishments, of which, 682 required police assistance

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[7] A city may rely on studies and experiences of other cities in determining whether a regulation furthers a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 40 (1986).

[8] These calls included: 30 drunk calls, 189 police assistance calls, 143 disorderly calls, 27 vehicle accident calls, 95 theft calls, 45 robbery calls, 24 weapons calls, 32 fighting calls, 64 burglary alarm calls, and 33 tavern check calls. Notice (Docket Entry No. 147) at tab 3.

and involved, possible violations of laws or ordinances. *Id.* at tab 3.

In light of these studies and reports, the Metro Council set forth in the preamble to Chapter 6.54 the findings that: (1) sex acts are a regular occurrence at adult entertainment establishments in Davidson County, especially were there are private or semi-private booths for viewing films or live sex shows; (2) that certain employees of adult entertainment establishment engage in higher incidents of unlawful activities than others; (3) that the sex acts and resulting unsanitary conditions occurring at some adult entertainment establishments are the result of the failure of the management of those establishments to regulate activities within those establishments; and (4) that other illegal or unhealthy activities occur as a consequence of these conditions. *See* plaintiffs' exhibit 6. The findings also include the statistics on the number of cases of sexually transmitted diseases, including acquired immunodeficiency syndrome (AIDS), gonorrhea, and syphilis in Tennessee and Davidson County. *Id.*

Based on the information relied upon by the Metro Council in promulgating Chapter 6.54, and its resulting findings as stated in the preamble, the Court finds that the Metro Council's purpose in enacting Chapter 6.54 was "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County" by reducing the spread of diseases which thrive in the conditions created by unregulated adult entertainment establishments and to combat the illegal activity that occurs within and around such establishments. Plaintiffs exhibit 6. Accordingly, the Court finds that the ordinance was promulgated to further an important and substantial governmental interest.

The plaintiffs further contend that Chapter 6.54 is invalid under the third element of the *O'Brien* test because it is a content-specific regulation, aimed at suppressing free expression.

The Court agrees that the regulation pertains exclusively to sexually explicit expression. However, because Chapter 6.54 is focused on the secondary effects of the expression, it will be treated as a content-neutral time, place, or manner regulation.[5] *Richland Bookmart*, 137 F.3d at 439-40. Therefore, the third element of the *O'Brien* test has been met.

The plaintiffs also contend that various portions of the ordinance do not satisfy the fourth element of the *O'Brien* test. The requirement that a regulation must be narrowly tailored to serve the government's interest does not require that the regulation be the "least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661, 679 (1989). Instead, a time, place, or manner

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[5] In *Richland Bookmart*, 137 F.3d at 439-40, the Sixth Circuit found that a regulation which focused exclusively on sexually explicit speech was content-specific on its face. However, the Court explained that although content-specific regulations are generally presumed to be unconstitutional and are subject to strict scrutiny, the Supreme Court has created a legal fiction under which regulations of erotic or sexually explicit expression are treated as if they are content-neutral providing that the regulation is really aimed at the secondary effects of the speech, rather than at the speech itself. *Id.* at 440 (*citing City of Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30, 89 L.Ed.2d at 38-40 and *American Mini Theatres*, 427 U.S. at 70, 96 S.Ct. at 2452, 49 L.Ed.2 at 340). The Supreme Court explained that regulations focusing on sexually explicit expression may be treated differently than regulations of other expression because the interest in protecting sexually explicit speech is marginal. *American Mini Theatres*, 427 U.S. at 72, 96 S.Ct. at 2452, 49 L.Ed.2d at 340.

regulation is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.*, 491 U.S. at 800, 109 S.Ct. 2758, 105 L.Ed.2d at 679.

A. Civil Disabilities Provision[10]

The plaintiffs contend that the civil disabilities provision of Chapter 6.54 is not narrowly tailored to serve the government's interest. They also contend that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision based on the Court's decision in *Ellwest*, 418 F. Supp. at 1568, that the civil disabilities provision in the predecessor ordinance was not narrowly tailored to serve the government's interest. The plaintiffs also challenge the civil disabilities provision as an impermissible prior restraint on their First Amendment rights.

The ordinance requires that sexually oriented corporations, corporate stockholders holding a majority share of stock who will be involved in the day to day operation of the business, officers, and directors be licensed. Plaintiffs' exhibit 5 at §§ 6.54.040(A)(1)&(4). Individual entertainers must also obtain a permit. Chapter 6.54.060(A).

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[10] The parties refer to these provisions as the criminal disabilities provisions but in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603, 621 (1990), the Supreme Court refers to a similar provision as the civil disabilities provision. The Supreme Court did not reach the merits of the plaintiff's challenge to the civil disabilities provision in *FW/PBS* because the Court found that the plaintiffs did not have standing to challenge the provision. *Id.*, 493 U.S. at 233, 110 S.Ct. at 608, 107 L.Ed. 2d at 623.

Under the civil disabilities provision of the ordinance, no individual applicant for a license or permit who has had a misdemeanor conviction for a crime of a sexual nature[11] may receive a license or permit for two years following the date of the conviction and no applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *Id.* at §56.54.050(B)(2) and 6.54.080(A)(2).

1. *standing*

That "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS*, 493 U.S. at 231, 110 S.Ct. at 607, 107 L.Ed.2d at 621 (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984)). The party seeking to exercise jurisdiction must "'clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Id.*, 493 U.S. at 231, 110 S.Ct. at 608, 107 L.Ed.2d at 622 (quoting *Warth v.*

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[11] "Chapter 6.54.010(C) defines "crimes of a sexual nature" as:

> the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

Plaintiffs' exhibit 5.

Seldin, 422 U.S. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343, 366 (1975)). A party asserting standing must prove:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

DLS, 107 F.3d at 414 (citing (*G & V Lounge*, 23 F.3d at 107).

Accordingly, to establish standing to challenge the civil disabilities provision of the ordinance, individual plaintiffs must show that they are required to obtain a permit or license under the ordinance and that they will be unable to do so because they were convicted of a misdemeanor of a sexual nature within two years of their application, or that they were convicted of a felony of a sexual nature within five years of their application. *See FW/PBS*, 493 U.S. at 234, 110 S.Ct. at 609, 107 L.Ed.2d at 624. In order for a sexually oriented business to have standing, it must show that it will be unable to obtain a license because an individual applicant, such as a corporate director or officer who is required to be licensed in order for the business to be licensed, will be ineligible to obtain a license due to the civil disabilities provision.

Deja Vu and Mr. Michael Butler assert that they have standing to challenge the civil disabilities provision of the ordnance. As a sexually oriented business, Deja Vu is required to be licensed under Chapter 6.54. Michael Butler and Deja Vu contend that Mr. Butler is a former vice-president of Deja Vu and that if he were still a vice-president he would also be required to obtain a license.[12] The plaintiffs presented evidence that in November of 1994, Mr. Butler was convicted under the Uniform Code of Military Justice with felony statutory rape.[13] Mr. Butler's conviction was for a felony of a sexual nature and was within five years of March 15, 1999, when Chapter 6.54.030(F) would have required him to apply for a licence. Accordingly, Mr. Butler would be prohibited from obtaining a license under the civil disabilities provision of Chapter 6.54. Deja Vu argues that it also has standing because if Mr. Butler had remained a vice-president, it would have been unable to obtain a license to operate under the civil disabilities provision of the ordinance because, in order to do so, Mr. Butler would have had to be licensed.

The Court finds that because Mr. Butler is no longer employed by Deja Vu as a vice-president, he is no longer required to obtain a license as a corporate officer of Deja Vu. Additionally, Deja Vu would not be prohibited from receiving a license based on Mr. Butler's conviction. Accordingly, neither Mr. Butler nor Deja Vu have standing

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[12] Mr. Butler testified that he resigned from his position at Deja Vu in November of 1998, only because of the licensing requirement.

[13] Mr. Bulter testified to this fact and also submitted an affidavit affirming it. Affidavit (filed December 17, 1998; Docket Entry No. 86) of Michael Butler.

to challenge the constitutionality of the civil disabilities provision of the ordinance.

Mr. Pendergrass and The 822 Corporation also challenge the civil disabilities provisions of the ordinance. The plaintiffs aver that Metro News, which is owned by The 822 Corporation, is a theater and retail bookstore dealing in the display and retail sale and rental of printed and pictorial materials of an erotic and sexual nature, and is, therefore, a sexually oriented bookstore required to be licensed under Chapter 6.54. Mr. Pendergrass is the sole shareholder, an officer, and a director of The 822 Corporation. Therefore, in order for The 822 Corporation to be licensed under the ordinance, Mr. Pendergrass must also be licensed. At the hearing, Mr. Pendergrass testified that he was convicted on May 22, 1997, of a misdemeanor obscenity offense in Hamilton County, Tennessee. He was required to apply for a license in Nashville by March 15, 1999, within two years of the date of that conviction. Therefore, pursuant to the civil disabilities provision of the ordinance, Mr. Pendergrass, and consequently The 822 Corporation, would be ineligible for a license. Accordingly, the Court finds that Mr. Pendergrass and The 822 Corporation have standing to challenge the civil disabilities provision of the ordinance.[14]

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[14] In their motion (Docket Entry No. 165) to strike the defendants' notice (Docket Entry No. 157), the plaintiffs' contend that the notice goes to the issue of whether the plaintiffs have standing to challenge certain aspects of the licensing provisions in Chapter 6.54 in their second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. They argue that their motion to strike should be granted because at the end of the hearing on the plaintiffs' motions, the Court stated:

(Continued on following page)

2. *collateral estoppel*

The plaintiffs claim that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision of the ordinance based on the Court's holding in *Ellwest* that the civil disabilities provision of the predecessor ordinance was unconstitutional because it was not narrowly tailored to serve the government's interest.

The defendants assert that collateral estoppel does not apply to bar relitigation of any provisions in Chapter 6:54 because "[t]he law regulating sexually explicit expression has changed over the past ten years such that regulations that may have been unconstitutional in 1989 may be constitutional now." Defendants' memorandum (Docket Entry No. 104) at 15.

Collateral estoppel does not apply when there has been a significant change in the applicable law. *Disabled Am. Veterans v. Commissioner of Internal Revenue*, 942 F.2d 309, 313 (6th Cir. 1991); *see also, Steen v. John*

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this is the evidentiary record on the application for preliminary injunction and when we close here today this is going to constitute the record.

Plaintiff's brief (Docket Entry No. 166) in support at 2.

Accordingly, the Court finds that the record for the motions (Docket Entry Nos. 81 and 83) for second preliminary injunction was closed at the end of the evidentiary hearing on April 15, 1999. As the defendants have not been granted leave to file additional materials, the Court shall grant the plaintiffs' motion (Docket Entry No. 165) to strike insofar as the notice relates to the plaintiffs' motions (Docket Entry Nos. 81 and 83). Accordingly, the defendants' notice will not be considered evident in support of, or in opposition to, the plaintiffs' second motions for preliminary injunction. However, the plaintiffs' motion (Docket Entry No. 165) to strike shall be denied in all other respects.

Handcock Mut. Life Ins. Co., 106 F.3d 904, 913 (9th Cir. 1997). The Supreme Court has found that such a change may occur when there is a "'judicial declaration intervening between the two proceedings . . . a modification or growth in legal principles as enunciated in intervening decisions of this Court . . . [or] an interposed alteration in the pertinent statutory provisions.'" *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen v. Commissioner of Internal Revenue*, 333 U.S. 591, 600, 68 S.Ct. 715, 720, 92 L.Ed. 898, 907 (1948)).

The defendants have not established that there has been a sufficient change in the case law between the time the Court rendered its decision in *Ellwest* and now regarding the provisions of the ordinance that the plaintiffs contend the defendants cannot relitigate.

The defendants also argue that collateral estoppel does not apply because the precise issues raised in this case are different from those litigated in *Ellwest*. In order for litigation of an issue to be barred based on collateral estoppel, "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding." *N.A.A.C.P. Detroit Branch v. Detroit Police Officer's Assoc.*, 821 F.2d 329, 330 (6th Cir. 1987) (footnote omitted).[15] The defendants contend that the issues in this case are different than the issues in *Ellwest* because the purpose of the ordinance in *Ellwest* was only to protect the

[15] Collateral estoppel also requires that a "determination of the issue must have been necessary to the outcome of the prior proceeding; that the prior proceeding must have resulted in a final judgment on the merits; and that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issues in the prior proceeding." *N.A.A.C.P., Detroit Branch*, 821 F.2d at 330.

health of the citizens of Nashville and Davidson County, whereas the purpose of Chapter 6.54, presently before the Court, is the broader purpose of promoting "the health, safety, morals, and general welfare of the citizens of Metropolitan Nashville Davidson County." Defendants' memorandum (Docket Entry No. 104) at 17.

The record reflects that the first paragraph of the ordinance under consideration in *Ellwest* states that the purpose of the ordinance is to protect and promote the "general welfare, health, and safety" of Nashville's citizens. Plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111) to defendants' memorandum of law in opposition. Accordingly, the purpose of Chapter 6.54 is broader only insofar as it also states that its purpose is to protect the morals of the citizens of Nashville.

The Court finds that the fact that the government added that the purpose of the ordinance is to protect the morals of the citizens is not sufficient to change the issue of the constitutionality of the ordinance. Accordingly, collateral estoppel is not inapplicable based on the allegedly broader purpose of Chapter 6.54.

With respect to the civil disabilities provision in particular, the defendants assert that collateral estoppel does not apply because the issue with respect to the constitutionality of the civil disabilities provision in this case is different from that in *Ellwest*. In *Ellwest*, the ordinance provided that applications for permits and licenses were to be denied if the applicant had been convicted or pleaded *nolo contendre* "to a felony or any crime involving moral turpitude, prostitution, obscenity or any crime of a sexual nature in any jurisdiction within the five (5) years immediately preceding the date of the

application." *Ellwest*, 718 F. Supp. at 1568 (quoting Section 5(a)(1)(ii) of Metropolitan ordinance (Bill No. 086-1549)).[16] In contrast, Chapters 6.54.050(B)(2) and 6.54.080(A)(2) limit the crimes for which an application may be denied to convictions of felonies or misdemeanors for crimes of a sexual nature. Plaintiffs' exhibit 5. Accordingly, the Court finds that the precise issue in this case was not litigated in *Ellwest* and that the defendants are not collaterally estopped from litigating the constitutionality of the civil disabilities provision in Chapter 6.54. *N.A.A.C.P., Detroit Branch*, 821 F.2d at 330.

3. *prior restraint*

The plaintiffs challenge the civil disabilities provision of Chapter 6.54 as an impermissible prior restraint on protected expression. They argue that the government cannot preclude a person or his employer from obtaining a license or permit to engage in constitutionally protected expression based on the fact that the person was previously convicted of obscenity.

Although laws may validly prohibit certain types of expression not protected, by the First Amendment, a prior restraint on the exercise of First Amendment rights is "the

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[16] This provision was found to be unconstitutional because it was not narrowly tailored to serve the government's interest in denying applications to those who were likely to operate their business in contravention of the ordinance. *Ellwest*, 718 F. Supp. at 1568. The Court reasoned that if the disclosure requirement had been limited to "such crimes as prostitution," rather than to any felony, there may have been a "reasonable inference that the applicant would be more likely to operate an adult-oriented establishment in contravention of the ordinance." *Id.*

most serious and least tolerable infringement on First Amendment rights." *Nebraska Press, Ass'n v. Stewart*, 427 U.S. 539, 559, 96 S.Ct. 2781, 2803, 49 L.Ed.2d 683, 697 (1975). Accordingly, "'[*any* system of prior restraints of expression [bears] a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2 413, 421 (1980) (quoting *Bantam Books*, 372 U.S. at 70, 83 S.Ct., at 639, 9 L.Ed.2d. at 593 (emphasis in original) (citations omitted)). Prior restraints against expression protected by the First Amendment are disfavored because "[i]t is difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 315 n.13, 100 S.Ct. at 1161 n.13, 63 L.Ed.2d at 420 n.13 (citations omitted).

In *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986), the Sixth Circuit considered the constitutionality of a nuisance abatement law which required the business license of distributors and exhibitors of adult oriented materials to be revoked if it was judicially determined that they had distributed obscene materials. The Court found that if:

> the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of *Near v. Minnesota*, a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of

> the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending [business]" and if the procedure does not "operat[e] to . . . put the publisher under an effective censorship." 283 U.S. at 709-12, 51 S.Ct. at 628-30.

City of Paducah, 791 F.2d at 469. The Court went on to find that the ordinance was an impermissible prior restraint because it went "beyond merely deterring or punishing individuals who deal in obscene materials . . . to control [their] future expression." *Id.* at 470.

The Sixth Circuit further noted that the Supreme Court has permitted prior restraints provided that the following procedural safeguards are in place to prevent the prior restraints from causing censorship:

> the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period of time and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. (quoting *Southeastern Promotions. Ltd. v. Conrad*, 402 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448, 460 (1975)).

In *City of Paducah*, the Sixth Circuit found that there were adequate safeguards within Paducah's nuisance abatement ordinance. *Id.* Nevertheless, the Court found that the ordinance was unconstitutional because it "would still operate as a prior restraint on plaintiff's future distribution of non-obscene materials." *Id.*

Based on the Sixth Circuit's conclusion in *City of Paducah*, the Court finds that, because Chapter 6.54 requires the sexually oriented licensing board to deny applicants a license or permit based on a prior conviction of obscenity, the civil disabilities provision of the ordinance is an unconstitutional prior restraint. Accordingly, the Court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits of their challenge to the civil disabilities provision of the ordinance.[17]

The defendants cite *Ino Ino Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997), and *DLS*, 107 F.3d 403 (6th Cir. 1997), in support of the constitutionality of the civil disabilities provision. However, the Court finds that these cases do not support the constitutionality of the civil disabilities provision in Chapter 6.54.

In *Ino Ino*, the plaintiffs challenged a similar civil disabilities provision only as a violation of the applicant's right to privacy. *Ino Ino*, 937 P.2d at 167-68. Accordingly, the Court does not find the decision in *Ino Ino* to uphold the civil disabilities provision in that case to be instructive. In *DLS*, the Sixth Circuit upheld a similar civil disabilities provision in a Chattanooga ordinance regulating sexually oriented businesses. The civil disabilities provision in that case prohibited an applicant from receiving a license or permit if the applicant had been convicted

[17] In *Ellwest*, this Court noted that "the practice of denying a person a license to engage in activities protected by the First Amendment based on prior convictions is constitutionally suspect. In particular, the courts have consistently struck down ordinances which permit or require the denial or revocation of a license to show adult-oriented motion pictures on the basis that an applicant or an employee of an applicant has been convicted of obscenity." *Ellwest*, 718 F. Supp. at 1572 n.5 (citations omitted).

of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature." *DLS*, 107 F.3d at 414. The plaintiffs "only argument" against the civil disabilities provision of the Chattanooga ordinance was "the fact that they were not enforced against the productions of *Hair* or *Oh! Calcutta!* demonstrates that they vest the City with unbridled discretion to award or deny licenses or permits." *Id.* Accordingly, the Sixth Circuit did not address whether it was permissible to deny a person license to engage in expression protected by the First Amendment because they had a previous conviction for obscenity. Therefore, the Court does not find the Sixth Circuit's decision to uphold the civil disabilities provision in that case to be determinative on the facts in this litigation.

B. Disclosure of Personal Information

The plaintiffs next challenge the provisions of Chapter 6.54 requiring that applicants disclose certain personal information. The plaintiffs challenge the requirement in Chapter 6.54.040(A)(5)(c) and 6.54.070(A)(4)(c) that applicants disclose their residential addresses for the past three years, the requirements in Chapter 6.54.040(A)(5)(g) and 6.54.070(A)(4)(g) that applicants submit their fingerprints and two portrait photographs, and the requirement in Chapter 6.54.070(A)(4)(d) that applicants disclose their "height, weight, color of eyes, and hair." Plaintiffs' exhibit 5.

The government contends, and the ordinance states, that applicants are required to comply with these provisions "for the purpose of facilitating the police investigation into the applicant's criminal background." Plaintiffs' exhibit

5, Chapter 6.54.040(A)(5)(c) & (g), 6.54.070(A)(4)(c), (g) & (d).

In light of the fact that the Court has found the plaintiffs are likely to be successful on their challenge to the civil disabilities provision of the ordinance, the Court further finds that it is also likely that the plaintiffs will be successful on their challenge to the disclosure requirements, as the only purpose for their inclusion in the ordinance is to facilitate the civil disabilities provision.[18]

C. Fee Requirements

Chapter 6.54.090 imposes a $500 fee on applications for a license and a $100 fee for applications for a permit. The plaintiffs challenge the constitutionality of these fees by asserting that they are excessive and are unconstitutional insofar as they are imposed to facilitate portions of the application process the Court has concluded will likely be found unconstitutional. The defendants contend that the fees are narrowly tailored to facilitate the administration of the ordinance and are, therefore, not excessive.

It is well established that the government may not tax the exercise of a constitutionally protected right. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997). However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not

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[18] Moreover, at the hearing on the plaintiffs' motions, Captain Judith D. Bawcum, an officer with the Metropolitan Police Department, testified that in order to run a criminal background check, the police use the person's name and date of birth, and that they sometimes also use a fingerprint if the person goes to the police station.

violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest." *Id.* at 1109-1110. Such a fee is not excessive, even if it is more than nominal, so long as it is "'reasonably related to the expenses incident to the administration of the Ordinance.'" *Id.* at 1110 (quoting *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991)).

The deposition testimony of Mr. Terry Cobb, Director of the Codes Department of Metropolitan Nashville Davidson County, established that the direct costs of processing permits for entertainers is $43, which includes: (1) $24 for the criminal background check; (2) $9 for fingerprinting; and (3) $10 for a photo identification. Brief (Docket Entry No. 84) in support of plaintiffs' second motion for preliminary injunction, attachment, exhibit W at 24-25. The direct costs of processing individual license applications is $33, which includes: (1) $24 for the criminal background check; and (2) $9 for fingerprinting. *Id.*

In light of the fact that the Court has found that the civil disabilities provision of Chapter 6.54 is likely to be found unconstitutional, the Court further finds that, insofar as the fees charged under Chapter 6.54.090 are for the administration of the civil disabilities provision, there is a substantial likelihood that the plaintiffs will also succeed on their challenge of the fee provision.

D. Three-Foot Buffer Zone

Chapter 6.54.140(C) also provides that "[a]ll performances . . . shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer." Plaintiffs'

exhibit 5. The plaintiffs contend that this provision violates the *O'Brien* test because it is content-specific and not narrowly tailored to serve the government's interest. The plaintiffs also contend that the buffer zone is vague because it does not indicate how three feet is to be measured. Finally, the plaintiffs contend that the buffer zone violates the First Amendment rights of customers and entertainers to freedom of association.

1. *content-neutral*

In the plaintiffs' view, the distance requirement is an attempt to ban dances, such as table or couch dances, that allow entertainers to convey a message of intimacy and eroticism through their proximity to the customer. Therefore, the plaintiffs contend that the buffer zone is a content-specific regulation and should be reviewed under strict scrutiny.[19]

The Court has found that the ordinance, including the buffer zone provision, was written primarily to combat the secondary effects of adult entertainment and is not subject

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[19] In support of their contention that distance is a central part of the expressive content of erotic dances, the plaintiffs presented the expert testimony of Dr. Judith Lynne Hanna, a cultural anthropologist who studies messages conveyed by dance. Dr. Hanna testified that proximity is an integral component of erotic dance performances and conveys a message of intimacy. In addition, dancers testified at the hearing that in order to convey the message they intend with their performances, it is often important that they be able to whisper to the customer for whom they are performing. Dancers testified that if they are required to remain three feet from a customer, their ability to convey messages through such oral communication would be impossible because the loud music in the entertainment establishment would make whispers inaudible.

to strict scrutiny. *Richland Bookmart*, 137 F.3d at 439. Accordingly, the Court will treat the buffer zone as a content-neutral time, place or manner regulation.

2. *narrowly tailored*

The plaintiffs contend that the buffer zone is not narrowly tailored to serve the government's interest in preventing sexual contact between entertainers and patrons. The plaintiffs rely on *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 1 (1997), in which the Supreme Court held that an injunction prohibiting abortion protesters from coming within 15 feet of people entering and leaving abortion clinics was unconstitutional because it "burdened more speech than necessary to serve the relevant governmental interest." *Id.*, 519 U.S. at 377, 117 S.Ct. at 867, 137 L.Ed.2d at 21. The Court's decision was based on the conclusion that, because the buffer zone floated around the people coming to and from the clinic, it would be difficult for protesters to remain in compliance with it and for courts to enforce it. Id., 519 U.S. at 379, 117 S.Ct. at 867, 137 L.Ed.2d at 21 and n.9. Additionally, the Court was concerned that due to the uncertainties caused by the fact that the zone floated, there was a substantial risk that more speech will be burdened than the injunction prohibits. *Id.*

Schenck is distinguishable from this case for several reasons. The buffer zone in this case differs from the one in *Schenck*, in that the buffer zone in *Schenck* was truly a floating buffer zone which surrounded the clinic visitors as they came and went from the clinic. Chapter 6.54, however, requires that during their performances, entertainers are to remain on a stage eighteen inches above the ground and three feet from the nearest customer. Consequently,

the three-foot buffer zone is fixed by the parameters of the stage, even though it may partially float around performers within those parameters.

The Court's decision in *Schenck* was also based on the conclusion that it prevented protestors from talking to clinic visitors at a normal conversational level. The plaintiffs contend that the three-foot buffer zone in this case suffers from the same problem because performers will not be able to carry on conversations with customers during performances from three feet due to the loud music in the entertainment establishments.

This problem differs from the one in *Schenck* because performers are not prevented from speaking to customers at a normal level entirely because of the three-foot distance requirement. Instead, as the plaintiffs admit, they are hampered due to the volume of the music in the entertainment establishments. The noise level is a factor completely under the control of the entertainment establishments and has no bearing on the constitutionality of the buffer zone.[20]

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[20] *Schenck* is also distinguishable for other reasons. First, the Supreme Court determined that the "'standard time, place, and manner analysis is not sufficiently rigorous' when it comes to evaluating content neutral injunctions that restrict speech." *Schenck*, 519 U.S. at 385, 117 S.Ct. at 857, 137 L.Ed.2d at 17 (quoting *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 2519, 129 L.Ed.2d 593, 593 (1994)). Second, the Court was concerned with political speech that "lie[s] at the heart of the First Amendment." *Schenck*, 519 U.S. at 358, 117 S.Ct. at 858, 137 L.Ed.2d at 21. Erotic expression, on the other hand, falls within the "outer parameters of the First Amendment." *Barns*, 501 U.S. at 566, 111 S.Ct. at 2460, 115 L.Ed.2d at 511. Finally, the sidewalks in *Schenck* were the "prototypical example of a traditional public forum," and adult entertainment establishments are not. *Schenck*, 519 U.S. at 358, 117 U.S. at 858, 137 L.Ed.2d at 21 (citations omitted).

Accordingly, the Court finds that the Supreme Court's decision in *Schenck* that the buffer zone violated the protestor's free speech rights is not determinative with respect to the constitutionality of the buffer zone in Chapter 6.54.

The plaintiffs also argue that the same interest may be accomplished without the buffer zone through the prohibitions on sexual contact, caressing, fondling, or touching found in Chapter 6.54.140(A) and (B). A content-neutral regulation of expression designed to combat secondary effects such as the buffer zone in this case is not invalid because there is an "imaginable alternative that might be less burdensome on speech." *Ward,* 491 U.S. at 797, 109 S.Ct. at 2757, 105 L.Ed.2d at 679. Instead, if the regulation is not "substantially broader than necessary to achieve the government's interest," it will be upheld. *Id.* at 800, 109 S.Ct. at 2757, 105 L.Ed.2d at 681. In *DLS,* the Sixth Circuit determined that a six-foot buffer zone between patrons and entertainers in adult entertainment establishments was narrowly tailored to serve the city's interest in preventing contact between customers and entertainers, and thereby prevent crime and disease. *DLS,* 107 F.3d at 413. Noting that the buffer zone "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," such as a no-touch rule, the Sixth Circuit found that the buffer zone was narrowly tailored. *Id.* at 412 (citing *Ward,* 491 U.S. at 800, 109 S.Ct. at 2757-58, 105 L.Ed.2d at 681.).

Likewise, the Court finds that even though Chapter 6.54.140(A) and (B) prohibit sexual contact, caressing, fondling and touching, the three-foot buffer zone is narrowly tailored to serve the government's interest in

preventing crime and sexual contact between entertainers and patrons. Accordingly, the Court finds that the plaintiffs are not likely to succeed in their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is not narrowly tailored to serve the government's interest.

3. *economic impact*

The plaintiffs next contend that the buffer zone is unconstitutional because of the severity of the economic impact it will have upon adult entertainment establishments. Because of this impact, the plaintiffs contend that the erotic expression is, in effect, being driven from the marketplace of ideas in violation of the First Amendment.

In *DLS,* the Sixth Circuit considered whether the economic impact of ordinances regulating adult entertainment renders such ordinances unconstitutional under the First Amendment. *DLS,* 107 F.3d at 413. The Court found that if an ordinance were to "destroy the market for adult cabarets, it might run afoul of the First Amendment, but not merely if it had adverse effects on the individual theater." *Id.* (citation omitted). Consequently, the economic impact on individual establishments does not raise First Amendment concerns. The appropriate inquiry is whether the economic impact of an ordinance in the aggregate forecloses a "reasonable opportunity" to operate an adult cabaret. *Id.* (citing *Renton,* 475 U.S. at 54, 106 S.Ct. at 932, 819 L.Ed.2d at 42).

Deja Vu presented evidence that, because of the configuration of seats and stages in its Nashville club and Ken's Gold Club, a majority of the floor space in these establishments will not be useable for the seating of customers if the three-foot buffer zone is in effect.

The Court finds that this evidence only establishes that the ordinance will impose a hardship of an undeterminable degree upon an undeterminable number of cabarets. It does not establish that the buffer zone forecloses a reasonable opportunity to open and operate a cabaret in Nashville. The plaintiffs did not present any evidence that the ordinance will destroy the market for adult cabarets. Nor did the plaintiffs present evidence that a three-foot buffer zone had been responsible for the closing of any adult cabaret in other areas.[21]

The plaintiffs have failed to present sufficient evidence to establish that the buffer zone would foreclose reasonable opportunities to open and operate adult cabarets. Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the economic impact of the buffer zone causes it to be unconstitutional.

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[21] At the hearing on the plaintiffs' motions (Docket Entry Nos. 81 and 83), the plaintiffs presented the testimony of Mr. Paul Bern in an attempt to establish that the application of a three-foot buffer zone would destroy the economic viability of adult cabarets in Nashville. Mr. Bern testified that the imposition of a four-foot buffer zone in adult cabarets in Washington State caused one profitable cabaret to become unprofitable. The Court finds that this testimony does not establish that Chapter 6.54 will prevent adult cabarets in Nashville from being viable. First, Mr. Bern only testified to the effect of the Washington ordinance on one cabaret. Moreover, Mr. Bern did not testify that any adult cabarets had closed in Washington. Additionally, the Washington ordinance contained other restrictions in addition to the buffer zone, including a lighting requirement, that could have caused the negative impact on the cabaret. *See Ino Ino, Inc. v. City of Bellevieu*, 937 P.2d 154, 171 (Wash. 1997). Accordingly, the Court finds that this evidence does not establish a likelihood of a similar effect due to the three-foot buffer zone in Chapter 6.54.

4. *freedom of association*

The plaintiffs contend that when an entertainer performs for a customer, they are engaging in private or intimate association and expressive association protected by the First Amendment which will be hampered by the buffer zone. Accordingly, the plaintiffs contend that the constitutionality of the buffer zone should be reviewed under strict scrutiny.

Our First Amendment jurisprudence has recognized private or intimate association and expressive association:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.

Dallas v. Stanglin, 490 U.S. 19, 24, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18, 25 (1989) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462, 471 (1984)). Those relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" are protected by the First Amendment as intimate

relationships. *Roberts,* 468 U.S. at 619-620, 104 S.Ct. at 3250, 82 L.Ed.2d. at 472. In order to determine whether a relationship may be protected under the First Amendment as intimate association, the Court may look at such factors as the number of people in the relationship, its purpose, policies, selectivity, and congeniality, as well as other relevant characteristics. *Id..*, 468 U.S. at 620, 104 S.Ct. at 3251, 82 L.Ed.2d at 472-73. Expressive association is protected to ensure that individuals who are pursuing the same or similar "political, social, economic, educational, religious, and cultural ends" may associate with each other. *Id.*, 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 472.

With respect to whether the contact between entertainers in adult cabarets and customers rises to the level of intimate association, performers entertain individuals who are willing to pay admission to the cabaret and a tip. Therefore, the association is not selective. Additionally, the customers generally view performances in the presence of all the other customers rather that in secluded areas. Therefore, even though the contact may be sexual in nature, it is not intimate. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of intimate association protected by the First Amendment.

With respect to whether the entertainment rises to the level of expressive association protected by the First Amendment, the Court finds that the entertainers and customers in adult entertainment establishments do not associate in order to pursue "political, social, economic, educational, religious, and cultural ends." *Roberts,* 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 474. Accordingly, the Court finds that the association between entertainers

and customers does not rise to the level of expressive association protected by the First Amendment.

As the Court has determined that customers and entertainers are not engaged in either intimate or expressive association, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone impermissibly interferes with their First Amendment right to freedom of expression.

5. *vagueness*

Finally, the plaintiffs contend that the buffer zone is impermissibly vague because it fails to provide any guidance as to how the three-foot distance requirement is to be measured.[22] The defendants contend that there is not a substantial likelihood that the plaintiffs will be successful in their vagueness claim because in *DLS*, 107 F.3d at 411, the Sixth Circuit upheld an ordinance establishing a similar six-foot buffer zone. The defendants further contend that the ordinance is not vague because "three feet" is a common and understandable term.

The Court finds that the Sixth Circuit's holding in *DLS* that a six-foot buffer zone was constitutional is not indicative of the plaintiffs' likelihood of success on the merits as the plaintiffs in *DLS* failed to challenge the buffer zone provision in that case as unconstitutionally

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[22] At the hearing on the plaintiffs' motions, the plaintiffs demonstrated that whether the measurement is taken from the place where the nearest customer is standing or from the place where the nearest customer could reach may determine whether the customer will be able to hand the entertainer money while she is on stage performing.

vague. Based on the "words of the ordinance itself," the Court agrees that the ordinance does not provide any guidance with respect to how three feet is to be measured. *Grayned*, 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228. As for "the interpretation of the [ordinance] given by those charged with enforcing it," Charles Watkins, the Sexually Oriented Business Inspector, testified during the hearing of the plaintiffs' motions that he was did not know how three feet would be measured. *Id.*

However, in determining whether a law regulating expressive activity is vague, courts do not require "perfect clarity and precise guidance." *Ward*, 491 U.S. at 794, 108 S.Ct. at 2755, 105 L.Ed.2d at 677 (citing *Grayned*, 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228-229 for the proposition that "we can never expect mathematical certainty in our language."). Although the standard for measuring three feet is "undoubtedly flexible, and the officials implementing [it] will exercise considerable discretion," the Court finds that the buffer zone is not unconstitutionally vague. *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is impermissibly vague.

E. Prohibition Against Physical Contact

Chapter 6.54.140(C) states that "[n]o customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment." Plaintiffs' exhibit 5. The plaintiffs challenge this provision as overbroad because it prohibits incidental,

unintentional, benign, or non-sexual contact between customers and entertainers.

In support of this assertion, the plaintiffs cite *Threesome Entertainment v. Strittmather*, 4 F. Supp. 719, 722-23 (N.D. Ohio 1988). In *Strittmather*, a similar no-touch provision was found to be unconstitutional because it lacked a mens rea requirement. However, the prohibition against touching in that case is distinguishable from the no-touch provision in Chapter 6.54 in that it provides criminal penalties.

Moreover, in order to be considered overbroad, a law must substantially threaten the exercise of First Amendment rights. *Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131. However, even if dancers remain a greater distance from customers while performing than they might if the law prohibited only intentional touching, the increased distance will not substantially threaten the exercise of their First Amendment right by significantly changing the message of their performance. *See KEV, Inc. v. Kitsap County*, 793 F.3d 1053, 1061 (1986). Furthermore, the Court finds that performances are unlikely to be affected by the no-touch provision in light of the fact that the performers are required to remain three feet from the nearest customer while performing under the buffer zone provision in the ordinance. Accordingly, the Court finds that there is not a substantial likelihood that the plaintiffs will be successful on their overbreath challenge of the no-touch provision in Chapter 6.54.140(C).

F. Hours of Operation

Chapter 6.54.120(A) requires that "[a]ll sexually oriented businesses shall be closed between the hours of

three a.m. and. eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays." Plaintiffs' exhibit 5. The plaintiffs contend that this provision does not further a substantial government interest, and therefore, fails the second prong of the *O'Brien* test. *Barnes*, 501 U.S. at 567, 111 S.Ct. at 2460, 115 L.Ed. 2d at 512. The plaintiffs further contend that because this restriction only applies to businesses protected by the First Amendment, it violates the Equal Protection Clause of the Fourteenth Amendment. The defendants contend that the Court should deny the plaintiffs' motion with respect to this challenge because the same restriction was upheld by this Court in *Ellwest*, 718 F. Supp. at 1577, and a similar restriction was upheld by the Sixth Circuit in *Richland Bookman*, 137 F.3d at 43.

The Court has found that reducing crime and the spread of sexually transmitted diseases is an important or substantial government interest. The preamble to Chapter 6.54 does not contain any information distinguishing the early morning hours from other hours with respect to the secondary effects of adult entertainment establishments. However, "[i]t is not unreasonable to believe that such regulation of hours of [adult entertainment establishments] would tend to deter prostitution" and other crimes. *Richland Bookmart*, 137 F.3d at 440-41. Moreover, adult entertainment establishments are only required to close 5 hours a day on weekdays and nine hours on Sunday. This is a minor infringement upon activity protected by the First Amendment. *Ellwest*, 718 F. Supp. at 1577. Accordingly, the Court finds that the hours of operation restriction is a valid time, place, or manner regulation.

In support of the plaintiffs' challenge under the Equal Protection Clause of the Fourteenth Amendment, the

plaintiffs contend that patrons of adult entertainment establishments have a fundamental right to visit adult establishments during the hours the ordinance requires those establishments to be closed. Therefore, the plaintiffs argue that the Court should review the constitutionality of the hours of operation provision under strict scrutiny.

Heightened scrutiny is not the appropriate level of scrutiny for regulations challenged as violating the Equal Protection Clause unless a government regulation utilizes "a classification [that] warrants some form of heightened review because it jeopardizes [the] exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12 (1992). If not, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

The Court finds that there is no fundamental interest in attending adult entertainment establishments during the hours in which the ordinance requires them to be closed. Nor does the hours of operation provision categorize patrons of adult entertainment establishments or adult entertainments on the basis of an "inherently suspect characteristic." *Id.* Accordingly, review of the hours of operation provision under heightened scrutiny is not appropriate based on the plaintiffs' challenge. The Court has found that the hours of operation provision furthers an important or substantial government interest. Therefore, the hours of operation provision is also rationally related to a legitimate state interest. Accordingly, the Court finds that the plaintiffs are not likely to succeed on

their challenges to Chapter 6.54.120(A) as an unconstitutional regulation under the First Amendment or Equal Protection Clause of the Fourteenth Amendment.

G. Definitions

1. *sexually oriented*

Chapter 6.54.010(X) defines "sexually oriented" as:

> any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."[23]

Plaintiffs' exhibit 5.

The plaintiffs contend that this definition is vague and overbroad as it potentially applies to a vast range of

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[23] Chapter 6.54.010(BB) defines "specified sexual activities" as: "(1) human genitals in a state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse, or sodomy; (3) fondling or erotic touching of human genitals, pubic region, buttock, or female breasts." Chapter 6.54.101(AA) defines "specified anatomical areas" as "(1) less than completely and opaquely covered: a. human genitals, pubic region, b. buttocks, c. female breasts below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely opaquely covered." Plaintiffs' exhibit 5.

expression and entertainment that do not cause the type of secondary effects at which the ordinance is aimed.

The Court agrees that the term "sexually oriented" is overbroad as it could apply to the exhibition of any film, video, or movie, even if it were not the type typically considered to be adult oriented, providing that it depicts "[l]ess than completely and opaquely covered" buttocks or female breasts as stated in Chapter 6.54.010(AA). Therefore, this definition does not limit sexually oriented films, videos, or movies to those which are distinguished by their emphasis on such depictions. Under this definition, PG or R-rated movies containing such depictions could also fall within the purview of the statute despite the fact that they are not the type of movies that cause the kind of secondary effects at which Chapter 6.54 is aimed. Consequently, the definition of "sexually oriented" "reaches a substantial number of impermissible applications. *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d. at 1132. Accordingly, the Court finds that the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented" in Chapter 6.54.010(X).

2. *sexually oriented bookstore and sexually oriented video store*

A. "sexually oriented bookstore" is defined in Chapter 6.54.010(Y)(1) as:

> an establishment having a *majority of its stock in trade or a majority of its floor space* in books, magazines, other periodicals, or any other items which are *distinguished or characterized by their emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for

> observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(4) defines sexually "oriented video store" as:

> a commercial establishment having *a majority of its stock or a majority of its floor space* dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are *distinguished or characterized by an emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observance by patrons therein.

Id. (emphasis added).

The plaintiffs assert that these definitions are unconstitutionally vague because the phrase "majority of stock" and "majority of its floor space" is vague.

In *Richland Bookmart*, the Sixth Circuit considered a vagueness challenge to a regulation of sexually oriented bookstores that defined the bookstores as those having their "principal or predominant stock or trade" in sexually oriented materials, devices or paraphernalia. *Richland*

Bookmart, 137 F.3d at 441. The Court rejected this challenge, finding that terms used in the definition were "understandable common terms." *Id.*

Likewise, the Court finds that the terms "majority of stock" and "majority of its floor space" are sufficiently clear to provide notice to bookstores and video stores that fall within the purview of the ordinance. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their vagueness challenge to the definitions of "sexually oriented bookstore" and "sexually oriented video store."

The plaintiffs also challenge these definitions as overbroad. In order to fall under the definition of a "sexually oriented bookstore," a store must have a majority of its stock in materials "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'" Chapter 6.54.010(Y). Additionally, in order to fall under the definition of a "sexually oriented video store," a store must have a majority of its stock of floor space in "sexually oriented videos." Such videos are narrowly defined in Chapter 6.54.010(Y)(4)(a) as those with a cover that depicts "specified sexual activities" or "specified anatomical areas." Accordingly, the Court finds that the plaintiffs are not likely to succeed on their claim that the definitions of "sexually oriented bookstore" and "sexually oriented video store" are overbroad.

Chapter 6.54.010(Y)(2) defines "sexually oriented nightclub" to mean:

> a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which *regularly* features live performances that are *characterized* by any actual or

> simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(3) defines "sexually oriented theater" to mean:

> an enclosed building *regularly* used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material *depicting, describing or relating* to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

Id. (emphasis added).

Chapter 6.54.010(Z) defines "sexually oriented entertainment" to mean:

> the *regular* presentation, for a fee or incidentally [sic] to another service, of material or exhibitions *distinguished or characterized by an emphasis* on matter depicting or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

Id. (emphasis added).

The plaintiffs contend that the definitions of "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment," are impermissibly vague in that there is no limitation on the scope of the interpretation of the term "regularly" featured, used, or presented.

The Court finds that there is no "real and substantial ambiguity" in the term "regular." *Bastiardanes v. City of Galveston,* 682 F.2d 1203, 1210 (5th Cir. 1982) (denying the plaintiff's vagueness challenge to a city zoning ordinance which restricted the operation of adult theaters on the basis that it was unclear what it meant to show adult films on a "regular basis"). In the case of *FW/PBS*, an ordinance regulated adult theaters and cabarets that regularly provided nudity, sexually explicit depictions, or descriptions. *FW/PBS,* 493 U.S. at 254, 110 S.Ct. at 619-20, 107 L.Ed.2d at 636-37. The plaintiffs challenged the term "regularly" as vague. Justice Scalia concluded that the term "regularly" in this context "can reasonably be interpreted to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise." *Id.,* (Scalia, J., concurring in part and dissenting in part). The same is true with respect to the term "regularly" as it is used in Chapter 6.54. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenge to the terms "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment" on the basis that the term "regularly" is vague.

Further, the plaintiffs contend that as the terms "sexually oriented nightclubs," "sexually oriented entertainment" and "sexually oriented theater" are overbroad as they are defined in the ordinance. The Court finds that, because the terms "sexually oriented nightclubs" and "sexually oriented entertainment" are limited to those that have regular presentations or performances characterized or distinguished by the inclusion of "specified sexual activities" or the exposure of "specified anatomical areas,"

the plaintiffs are not likely to succeed on their challenge that these definitions are overbroad.

However, the definition of "sexually oriented theater" could include those theaters which regularly present films, motion pictures, and videocassettes which merely depict "specified sexual activities" or, "specified anatomical areas." It does not limit the theaters to those that show films, motions pictures, and videocassettes that are distinguished or characterized by such depictions. Consequently, this definition includes a vast number of theaters which show, for instance, PG or R-rated movies containing such depictions, but which would not cause the kinds of secondary effects at which Chapter 6.54 is aimed. Therefore, the definition of "sexually oriented theater" "reaches a substantial number of impermissible applications." *Ferber,* 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132. Accordingly, the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented theater" in Chapter 6.54.010(Y)(2).

H. Booth Regulation

Chapter 6.54.050 of the ordinance sets forth certain construction standards and regulatory provisions concerning any "booth" for the "viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos." Plaintiffs' exhibit 5. The plaintiffs contend that the booth regulations are overbroad because they apply to businesses and forms of entertainment that do not cause the types of secondary effects at which Chapter 6.54 is aimed.

The term "sexually oriented video" has been narrowly defined as those that depict specified sexually activities or specified anatomical areas on its cover. Therefore, the definition of "sexually oriented video" does not reach a "substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132. As set forth above, the term "sexually oriented" is substantially overbroad as it applies to films and movies. However, the plaintiffs have not established that there are a substantial number of circumstances in which films and movies to which the term "sexually oriented" impermissibly applies are shown in the types of booths that Chapter 6.54 seeks to regulate. Therefore, the plaintiffs have not established that the booth requirement is overbroad because it "reaches a substantial number of impermissible applications." *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on their overbreath challenge to the booth requirements in Chapter 6.54.050.

I. Revocation and Suspension Provisions

Chapter 6.54.150(A)(9) states that the board shall revoke a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54." Plaintiffs' exhibit 5. Chapter 6.54.150(B)(1) states that the board shall either fine, suspend or fine and suspend a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030." *Id.*

The plaintiffs contend that this provision is impermissibly vague because it does not provide sufficient guidance

as to what constitutes a "sanitary and safe condition." The Court finds that in order for the board to revoke, suspend, and/or fine a licensee under these sections, the licensee must be in violation of Chapter 6.54, Metropolitan Code § 7.24.030, or Tennessee Code Annotated, § 57-4-204. Because the Metropolitan Code, § 7.24.030, Tennessee Code Annotated, § 57-4-204, and Chapter 6.54, all contain standards for determining whether a business is in compliance with them, the Court finds that the plaintiffs are not likely to succeed on their challenge to Chapters 6.54.150(A)(9) and 6.54.150(B)(1) as impermissibly vague.

J. Severability

Chapter 6.54.170 states:

> Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter.

Plaintiffs' exhibit 5.

When legislation contains a severance clause, "[i]t is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act" "unless observance thereof would frustrate the dominant legislative intent." *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) (citations omitted). Moreover, if severing the unconstitutional provisions of an act would cause it to be essentially meaningless, the Court should not give

effect to the severability clause. *Ellwest*, 718 F. Supp. at 1581.

IV.

As set forth above, the Court finds that the plaintiffs have made the required showing of a substantial likelihood of success on the merits that numerous provisions of Chapter 6.54 are unconstitutional as violations of the First or Fourteenth Amendments to the United States Constitution. If the Court were to give effect to the severability clause, the remaining provisions would frustrate the dominant legislative intent of the ordinance. Accordingly, a preliminary injunction will issue against the defendants. The defendants shall be enjoined from enforcing Chapter 6.54, in its entirety, pending the adjudication of these cases on the merits and entry of a final judgment.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99

[UNITED STATES DISTRICT COURT]
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al. v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	No. 3:97-1066 Judge Nixon Magistrate Judge Griffin
and JERRY C. PENDERGRASS, et al., v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	Consolidated Cases No. 3:97-1176 Judge Nixon Magistrate Judge Griffin

ORDER

(Entered Dec. 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63). Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth in the accompanying memorandum, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby DISSOLVED.

It is so ORDERED.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

[UNITED STATES DISTRICT COURT]
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.,	
v.	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	No. 3:97-1066 Judge Nixon Magistrate Judge Griffin
and	Consolidated Cases
JERRY C. PENDERGRASS, et al.,	
v.	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	No. 3:97-1176 Judge Nixon Magistrate Judge Griffin

MEMORANDUM

(Entered Dec. 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63).[1] Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons, set forth below, Defendant's motion is

[1] Plaintiffs have filed both a Response (Doc. No. 63) and a Memorandum in support of their Response (Doc. No. 64). For the sake of brevity, the Court's citations to Plaintiffs' Response shall in actuality refer to Plaintiffs' Memorandum. (Doc. No. 64.)

GRANTED and the preliminary injunction imposed in this ease is hereby dissolved.

I. Background

This case revolves around Defendant Metropolitan Government of Nashville and Davidson County's (hereinafter Metro) Sexually Oriented Business Ordinance ("the Ordinance"). By Order dated December 8, 1997, this Court granted Plaintiffs' motion for a preliminary injunction based on the findings that the Ordinance as written did not sufficiently preserve the status quo, nor did it provide for sufficiently prompt judicial review. (Doc. No. 23.) Defendant has moved for the preliminary injunction to be dissolved now that the Ordinance has been amended, as has the State's writ of *certiorari* statute. (Def.'s Mem. at 2-3.) The Court held a hearing on November 5, 1998, during which time the parties had an opportunity to present evidence and argue their positions.

A. The Enjoined Ordinance

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment. This Court enjoined a regulatory scheme enacted by the Metro Council which requires "sexually oriented businesses" to obtain licences before being permitted to operate and adult entertainers

employed in these establishments to obtain permits in order to perform.[2]

The Ordinance as originally written specifically requires the operators of all "sexually oriented businesses," including bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas'" to obtain licenses to operate issued by a specially established board ("the Board"). Tenn. Code Ann. § 6.54.010(S). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booths, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070A)(2). Operators who have been convicted or pleaded *nolo contendere* to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers employed in these businesses. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons, including discovery that an operator employs an entertainer who does not have a permit, or the furnishing of sexually explicit material to minors. §§ 6.54.100, 6.54.140.

Once the application is received, the Board must distribute a copy of the application "promptly" to the

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[2] Again for the sake of brevity, the Court hereinafter will refer only to licenses sought by businesses since the issues at hand apply equally to license seekers as well as permit seekers.

Police Department, the Department of Codes and Administration, the Health Department, the Fire Department, and the applicant. § 6.54.040(A)(1). These departments are required to conduct inspections and to provide reports to the Board within thirty days of receipt of the application. § 6.54.040(B)(3). The Board is then required to make its determination within twenty days of receiving these reports. § 6.54.040(C)(1). However, in certain circumstances, the Board may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The enjoined Ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the Board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[3] The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. In addition, the Ordinance permits an applicant to appeal by filing a petition for writ of certiorari, in which case the Board must submit all records of the proceedings before it to the court within ten days. *Id.* The enjoined Ordinance makes similar provisions

[3] The Board is required to meet twice a month. § 6.54.020(d)(1). Board Policy No. 10 dictates that the Board meet on the second and fourth Tuesdays of every month.

for the appeal of the denial of an entertainer's permit. However, in the case of entertainers, the board has only fifteen days to make its initial determination after receiving the reports from other agencies, although it may hold the application for an additional thirty days under specified circumstances. §§ 6.54.070(C)(1), (C)(5).

B. The Amended Ordinance

1. Maintenance of the Status Quo

The amended Ordinance allows currently operating businesses to appeal adverse administrative decisions within 60 days, during which time the adverse decision is stayed. Furthermore, once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits. § 6.54.040(E)(3). If the business or entertainer forgoes appeal, they may continue to operate until the 60 day period has expired. *Id.* An identical provision applies to individual permit applications. § 6.54.070(D)(3).

2. Prompt Review

a. *Administrative Determinations*

The administrative process, as amended, will be completed in 47 days. (Def.'s Mem. at 4). Upon submission of application for a license, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business, and the police Department will run a criminal background check on the applicant. § 6.54.040(B)(1). All of these departments must submit reports to the Board within 20 days of the filing of the application. *Id.* Failure to investigate or submit a

timely report by any department will be construed as though the department approved the application. *Id.*

Once the Board has the reports, it must meet and deny or grant the application within 15 days. § 6.54.040(C)(1). Failure to meet or meeting without a quorum shall be treated as an approval of the application and the license will be mailed to the applicant. *Id.* If the Board meets on the 15th day and allowing one day to mail the result, the entire process will be complete in 47 days.[4] (Def.'s Mem. at 4.)

Upon denial of an application, the applicant can appeal to the Board for a full hearing or proceed to court. § 6.54.040(E)(1)-(2). The applicant has 5 days to appeal to the Board and the Board has 15 days to meet and hear the appeal. §6.54.040(E)(1)(a)-(b). An oral decision will be rendered at the hearing. § 6.54.040(E)(1)(d) Allowing one day to mail a written decision, the applicant may add an additional 21 days to the administrative process at his or her discretion.

b. *Judicial Review*

Applicants can apply for a writ of *certiorari* in order to have the final decision of the Board reviewed since a procedure for review is not otherwise provided. Tennessee Code Annotated § 27-9-111, addresses the briefing and hearing schedule used in processing writs. The section has been amended as follows:

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[4] Including a potential ten day extension for additional investigation into out-of-state records, if necessary. § 6.54.040(C)(8).

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, *the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.* When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of *certiorari*.

(Emphasis added.) The statute thus now requires a decision within a mandated period of time for all First Amendment cases.

II. Discussion

In order to determine the propriety of injunctive relief, the Court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc., v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter,*

716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited*, 52 F.3d at 1385-86 (quoting Merrill Lynch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. Likelihood of Success on the Merits

This Court enjoined the original Ordinance on two grounds: 1) the Ordinance failed to sufficiently maintain the status quo pending judicial review; and 2) the Ordinance did not provide for prompt judicial review. (Court's Mem. at 10-15.) Both of the grounds fell under the Court's analysis of the Plaintiffs' likelihood of success on the merits. *Id.*

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS. Inc. v. City of Dallas,* 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS. Inc.. v. City of Dallas,* 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be

given unlimited discretion so as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225-26. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period of time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Status Quo

Plaintiffs did not respond to Defendant's assertion that the amended Ordinance now provides for preservation of the status quo pending judicial review, (*See* Pls.' Mem.), as Defendant noted during oral argument. Upon review of the record and in light of Plaintiffs' failure to respond to this issue, the Court finds that the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review such that Plaintiffs are no longer likely to succeed on the merits of this particular issue.

2. Prompt Judicial Review

The Defendant argues that the amended Ordinance, together with the amended State statute regarding writs of certiorari, provide for prompt judicial review. The administrative determination will be complete within 47 days and the appeal process following adverse administrative decisions will be complete within 40 days. (Def.'s Mem. at 9.) The 47-day process is mandated by the timetable built into the Ordinance. The amended writ statute answers this Court's concern regarding the issuance of an

opinion within a mandated period of time by requiring that all First Amendment cases be heard and decided within 40 days. (Def.'s Mem. at 7).

Defendant next points out that the 40-day period within which writ decisions regarding the First Amendment must be made is less than the impermissible 5 month delay cited in *East Brooks Books v. City of Memphis,* 48 F.3d 220 (6th Cir. 1995) (rehearing and suggestion for rehearing *en banc* denied May 5, 1995). Furthermore, though the case law does not indicate what specific time period would satisfy the "prompt judicial review" standard, *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 373-74 (1971), determined that 60 days for the completion of judicial proceedings was sufficient to meet the standard. Thus, the period for completion of judicial review under the amended Ordinance sufficiently cures the enjoined Ordinance's flaw in not providing any meaningful period of time within which an opinion must issue, as well as meets the legal standard for "prompt judicial review."

The Defendant further notes that the Court cited approvingly to a case in its Memorandum granting the preliminary injunction in which a 90-day waiting period from the beginning to the end of the judicial proceedings was found reasonable. *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992). The waiting period under the ordinance as amended is only 87 days – 47 for the initial determination and 40 for the judicial review. Finally, in the event that the court fails to rule within 40 days of the filing of the appeal, the license shall issue. Metropolitan Code § 6.54.150(A)(10).

Plaintiffs counter with three arguments. First, Plaintiffs contend that in the Sixth Circuit, "prompt judicial review" requires a prompt judicial *determination*, not merely access to review. (Pls.' Mem. at 3-4 citing *East Brooks Books, supra.*) Second, the Ordinance still does not mandate a time by which a writ petition must be granted or denied. (Pls.' Mem. at 5.) Since courts determine their own dockets and the only remedy for tardiness is popular vote, the Ordinance cannot guarantee that a decision will be handed down by the court hearing the writ petition within a sufficiently "prompt" period of time. *Id.* Plaintiffs also contend that courts will not be bound by the 40-day period in which they are to hand down decisions since a similar statute requiring Judges in non-jury cases to render an opinion within 60 days was held to be directory, not mandatory. (*Id.* at 5-6, citing *Schaeffer v. Richard*, 43 Tenn. App. 205, 306 S.W.2d 340 (1956, *cert. den.* Tenn. Sup. Ct. 1957.) Finally, Plaintiffs argue that the granting of a writ petition is discretionary and provides for an extremely narrow scope of review even when granted. (*Id.* at 6-13.) Common law writs only allow a determination of whether the Board acted illegally, fraudulently, or beyond its jurisdiction. (*Id.* at 8.) Thus, Plaintiffs contend, the intrinsic correctness of the Board's decision can not be reviewed pursuant to a common law writ. (*Id.* at 6.)

The Court notes initially that Plaintiffs are correct in their assertion that the Sixth Circuit requires a prompt judicial determination in order to meet the "prompt judicial review" standard. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1241-42. However, the Court disagrees with Plaintiffs that the State writ of

certiorari statute as amended does not mandate a determination within a sufficiently prompt period of time. The statute clearly states that a decision must be handed down within 40 days of the court granting the writ of *certiorari*. Tenn. Code Ann. § 27-9-111. The Defendant has filed an affidavit from the Clerk and Master for the Chancery Courts of Davidson County in which she swears that "[g]enerally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and issuing the writ of *certiorari* within two days of the filing of the petition." (Def.'s Exhibit D to Mot. at 2.) Thus, Plaintiffs' concern that the courts will not promptly determine whether or not to grant the writ petition is unfounded.

Plaintiff's second contention, that the courts will not be bound by the 40-day period, relies on reasoning from *Schaeffer v. Richard, supra*. The *Schaeffer* decision is distinguishable, however, since in that case, the legislature did not declare void decisions that were not rendered within the mandated 60-day period. *Id.* at 212. Thus, in that case there was no recourse if a decision was rendered outside of the "mandated" period. In the instant case, if a decision is not rendered within the 40-day period, then the license shall issue, thus a safeguard is in place against judicial tardiness. The legislature need not declare the tardy decision void, since the license shall issue and remain in effect until and unless the decision finally rendered revokes it. Therefore, this argument by the Plaintiffs also lacks merit.

As for Plaintiffs' contention that the granting of the writ is discretionary and that it is too narrow in scope to provide adequate judicial review, this Court notes that

Plaintiffs admitted during oral argument that Defendant has done all that it can do within its power as Metro to make judicial review of Board determinations prompt. The Court is not convinced by Plaintiffs' argument that the amended statutory language of the State writ statute does not require that all First Amendment cases be heard, thereby causing a fatal flaw in the statute. Plaintiffs themselves argue that without a review under a writ of *certiorari*, applicants will have no basis for review of adverse decisions. The Tennessee Supreme Court has ruled, however, that common law writs should be granted where denial of the writ is "tantamount to the denial to either party of a day in court." *State v. Johnson,* 569 S.W.2d 808, 815 (Tenn. 1978) (Finding exceptions to the general rule that the common law writ does not permit review of the correctness of a judgment.). As for the scope of review, the state courts have determined that a violation of a constitutional standard falls within the definition of "illegal, arbitrary, or fraudulent" actions which are reviewable under common law writs. *Hoover, Inc. v. Metro Bd. of Zoning Appeals,* 924 S.W.2d 900, 905 (Tenn. App. 1996.). Furthermore, "[u]nder the common law writ of certiorari, . . . [w]hether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court *upon an examination of the evidence introduced before the agency." Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980) (Emphasis added.) Thus, the Court finds that Plaintiffs are incorrect in asserting that the "intrinsic correctness" of the Board's decisions under the Ordinance cannot be reviewed.

Plaintiffs argued at the hearing that a mistake in documentation for an entertainer as to his or her age, for

example, would not be reviewable under a writ of *certiorari*. The Court submits that such an error is easily remedied by providing the correct documentation to the Board via a corrected or even a completely new application. Furthermore, in the Court's Memorandum granting the preliminary injunction, the Court referenced a proposed rule from Defendants that was more vague than the language ultimately used to amend the Ordinance and stated that the rule was flawed in that it was merely a proposal, but that an enacted version of the rule is "exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine." (Ct.'s Mem. at 15.) Defendant has come back to this Court with an amendment more specific than its proposed rule which mandates that decisions must be rendered by courts within an acceptable, specific period of time. Furthermore, the Ordinance now requires that a license issue if the judicial proceedings take longer than 40 days. This Court noted in its December 8, 1997 Memorandum that such a provision would meet the directives of the First Amendment. (*Id.*)

Based on the above analysis, this Court finds that Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits, as they could when the preliminary injunction was originally issued. Therefore, although analysis of the original Ordinance favored the Plaintiffs with respect to the other three factors since Plaintiffs established a substantial likelihood of success on the merits, that is no longer the case.

B. Irreparable Harm

It is settled that non-obscene nude dancing is constitutionally protected activity within the scope of the First

Amendment. *Barnes v. Glen Theaters. Inc.,* 501 U.S. 560, 565-66 (1991); *G & V Lounge Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d at 1075. However, since prior restraint of the dancing is no longer a substantial threat, the Court finds that irreparable harm will not be caused if the Ordinance as amended goes into effect.

C. Public Interest

Since the statute no longer presents a substantial possibility of infringing upon an individual's constitutional rights, the amelioration of the harmful side effects that sexually oriented businesses may promote is sufficient for this Court to find that this factor favors the Defendant.

D. Possibility of Substantial Harm to Others

This Court has found that an individual's constitutional rights are no longer at substantial risk under the Ordinance; therefore, it follows that there is no risk of substantial harm to others if the injunction is lifted. Indeed, this Court would harm the autonomy of the legislative bodies of the State of Tennessee and the City of Nashville if it continued to enjoin this Ordinance having found that Plaintiffs lack a substantial likelihood of success on the merits. Thus, this factor favors Defendant's position, as well.

III. Conclusion

The Court finds that the Ordinance as amended no longer presents substantial prior restraint problems since it provides for prompt judicial review of adverse decisions and the maintenance of the status quo while adverse

decisions are appealed. Therefore, Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits and the preliminary injunction issued by this Court on December 7, 1997 is no longer justified. Accordingly, Defendant's motion to dissolve that preliminary injunction is GRANTED and the injunction is hereby dissolved.

An Order consistent with this memorandum will be filed contemporaneously.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED

No. 05-1194 MAR 16 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC. (d/b/a Ken's Gold Club), a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS, individually; THE 822 CORPORATION; and 421 CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX to PETITION FOR A WRIT OF CERTIORARI VOLUME II, Pages 180a-368a

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March 16, 2006

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	
v.	No. 3:97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	Chief Judge Nixon

ORDER

(Entered Dec. 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby ORDERS that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly.

After reviewing the record, the Court finds that the Plaintiffs' Motion for a Preliminary Injunction should be

GRANTED. It is ORDERED that the Defendants, Metropolitan Government of Nashville and Davidson County, and Emmett Turner, Chief of Police, are hereby prohibited from enforcing any of the provisions of Chapter 6.54 of the Nashville and Davidson County, Tenn. Code of Laws until otherwise tied by the Court.

It is so ORDERED.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	
v.	No. 3:97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	Chief Judge Nixon

MEMORANDUM

(Entered Dec. 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby orders that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly. The Court held a hearing on December 1, 1997, during which time the parties had an opportunity to present evidence and argue their positions.

After reviewing the record, the Court finds that the Plaintiffs have satisfied their burden of proving the elements necessary for a preliminary injunction, and orders that the Defendants be hereby enjoined from enforcing any of the provisions of Chapter 6.54 of the Metropolitan Code of Laws.

I. BACKGROUND

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment, and operate adult theaters and bookstores. They are seeking to enjoin a regulatory scheme enacted by the Council of the Metropolitan Government of Nashville and Davidson County on August 19, 1997, which requires "sexually oriented businesses" to obtain licenses before being permitted to operate, and adult entertainers employed in these establishments to also obtain permits in order to perform. The mayor approved the ordinance on August 25, 1997, and it took effect on November 1, 1997. Existing business have one hundred and twenty days after November 1st to apply for a license, Nashville and Davidson County, Tenn., Code § 6.54.030(F) (Supp. Sept. 1997), and entertainers have forty-five days from that date to apply for a permit, § 6.54.060(B).

The ordinance specifically requires partners in a partnership who participate in the day-to-day running of a sexually oriented business, majority stockholders of such businesses, and any officers or directors of such businesses (collectively "operators"), to obtain licenses to operate issued by a specially established board. § 6.54.010(S). The

term "sexually oriented business" as defined by the ordinance includes bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas.'" § 6.54.010(S)(1)-(4). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booth, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070(A)(2). Applicants who have been convicted or pleaded nolo contendere to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time, two years from the date of conviction for a misdemeanor, and five years from the date of conviction for a felony. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers seeking to obtain a permit. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons specifically prescribed in the statute, including discovery that an operator employs an entertainer who does not have a permit, or furnishes sexually explicit material to minors. §§ 6.54.100, 6.54.140.

Once the application is received, the board must distribute a copy of the application "promptly" to the police department, the department of codes and administration, the health department, the fire department, and the applicant. § 6.54.040(A)(1). The departments are required to conduct inspections and to provide the reports to the board within thirty days of receipt of the application. § 6.54.040(B)(3). The board is then required to make its determination within twenty days of receiving these

reports. §6.54.040(C)(1). However, if the board needs additional information, or is awaiting out-of-state documentation, it may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[1] §§ 6.54.040(E)(1)(b), 6.54.070(D)(6)(b). The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may made directly to the Chancery Court for the state of Tennessee. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. *Id.* In addition, the ordinance permits an applicant to appeal by filing a petition for a writ of certiorari, in which case the board must submit all records of the proceedings before it to the court within ten days. *Id.*

II. DISCUSSION

In order to determine the propriety of injunctive relief, the court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable

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[1] The board is required to meet twice per month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the board must meet the second and fourth Tuesdays of every month.

harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter,* 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited,* 52 F.3d at 1385-86 (quoting Merrill Lynch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. Likelihood of Success on the Merits

For the purpose of the preliminary injunction, the Plaintiffs have limited their motion to two issues, first, they challenge the ordinance on its face because it fails to provide for prompt judicial review of the board's decision, and second, they challenge the disabling provisions of the ordinance.

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of

ideas,'" as is the case here. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS. Inc. v. City of Dallas,* 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be given unlimited discretion as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225-26. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Undue Delay

The Plaintiffs allege that this ordinance fails to meet these promptness requirements for three reasons. First, it allows for a wait of almost one hundred days before an appeals hearing is conducted. This includes a one day wait for the board to distribute the application;[2] thirty days for

[2] Although the statute itself only requires that the board distribute the application promptly, the board has interpreted this to mean that the application should be distributed the same day they are received, or the following business day if received after 4:00 p.m. Board

(Continued on following page)

the departments to conduct their inspections; twenty days for the board to make its determination; in certain circumstances, an additional thirty days for the board to act; one day for the applicant to request an appeals hearing (assuming he or she acts promptly); and fourteen days for the board to meet and hold the hearing. The plaintiffs claim that this delay exceeds the sixty-day delay in *East Brooks Books*, which the Sixth Circuit held was unconstitutional.

The Defendants maintain that the ordinance places brief and specified time periods on the board to act on the application. They calculate the time period in which an initial decision is made differently, without including the time required to hold a hearing on appeal before the board. They point out that the ordinance imposes only an eighty-one-day waiting period before the initial determination by the board, and that this is close to the sixty-day period which was upheld in *DLS, Inc. v. City of Chattanooga,* 894 F. Supp. 1140 (E.D. Tenn. 1995), and *Ellwest Stereo Theater, Inc. v. Broxer*, 718 F. Supp. 1553, 1570 (M.D. Tenn. 1989).

However, neither *East Brooks Books, DLS,* or *Ellwest* are directly on point with respect to this issue. The opinion in *Ellwest* does not even reach the issue of whether the length of time given to a decision-maker to issue a license suppresses free speech. Similarly, the court in *East Brooks Books* did not discuss whether the time given to the decision-makers to issue a license was not constrained and therefore a form of unbridled discretion. Rather, the court focused on whether there was prompt judicial review of

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Policy No. 5. For the purposes of this motion, the Court will accept the board's interpretation.

the licensing decisions. *See East Brooks Books,* 48 F.3d at 224-225. The Supreme Court in *FW/PBS* has made clear however, that these are two separate inquiries. First, the ordinance must place limits on the time during which the decision to issue a license is made, and preserve the status quo during that time, and second, there must also be prompt judicial review of this decision. *FW/PBS,* 493 U.S. at 227. Finally, while the district court in DLS did discuss the issue of whether the licensing ordinance sufficiently limited the time in which the decision-maker must determine whether to issue a license, the Sixth Circuit on appeal did not touch upon the issue. This was because the Sixth Circuit determined that the Plaintiffs did not have standing to challenge the licensing scheme. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997). Thus, since the district court erroneously concluded that the plaintiffs had standing to challenge the licensing scheme, any decision that it made with respect to this issue is dicta.

Accordingly, the most recent and direct authority on this issue is the Supreme Court decision in *FW/PBS*. In that case, Justice O'Connor[3] determined that the licensing scheme at issue in that case should be struck down because it allowed for an "indefinite postponement of the issuance of a license." *FW/PBS*, 493 U.S. at 227. This was

[3] Only two other Justices, Stevens and Kennedy, joined in this part of Justice O'Connor's opinion. However, Justices Brennan, Marshall, and Blackmun in their concurrence agreed with the aspects of Justice O'Connor's opinion that are at issue here. These Justices' only disagreement with O'Connor's opinion was with her determination that the government need not bear the burden of effecting the denial of a license in court, or bear the burden of proof once in court. *See FW/PBS*, 493 U.S. at 439-42.

so because although the ordinance required the chief of police to rule on the issuance of a license within thirty days after the receipt of the application, a license could not be issued without the approval of other departments. *Id.* The ordinance did not limit the time during which these departments were required to make their inspections. *Id.*

The ordinance presently at issue has a sufficiently circumscribed time limit for the issuance of a license or permit. The only indeterminate time allowance in the ordinance is the provision that directs the board to distribute the application, when first received, "promptly" to the various departments that need to conduct inspections. § 6.54.040(A)(1). However, the board has sufficiently cured this by adopting a policy which requires them to distribute the application at the latest by the next business day. Board Rule 5. The Plaintiffs nevertheless maintain that the waiting period, even if sufficiently specified, is too long to constitute a "reasonable time period." *See East Brooks Books*, 48 F.3d at 224. "The reasonableness of the time period during which a restraint on speech may operate prior to judicial review "may vary in different contexts." *11126 Baltimore v. Prince George's County, MD,* 58 F.3d 988, 997 (4th Cir. 1995) (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 374 (1971)). The court should take into account "the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint." *Id.* (citation omitted).

As an initial matter, it should be noted that the time period in which an initial decision must be made does not include the time it takes to appeal or obtain a hearing at the administrative level. The Sixth Circuit made this clear in *East Brooks Books,* when it included the time required

to obtain a hearing before the Chief of Police in its computation of the time it took to obtain *judicial review* of the ordinance. *East Brooks Books,* 48 F.3d at 225. That said, it appears from review of other decisions that the time it takes to obtain an initial licensing determination under the ordinance presently at issue is at the borderline of constitutionality. *See, e.g., 1126 Baltimore,* 58 F.3d at 997 (150-day delay is not a reasonably brief time); *TK's Video, Inc. v. Denton County, Tex.,* 24 F.3d 705, 708 (5th Cir. 1994) (upholding 60-day waiting period); *Chesapeake B & M. Inc. v. Hartford County, Md.,* 831 F. Supp. 1241, 1249-50 (D. Md. 1993) (upholding 44-day waiting period), *rev'd in part, vacated in part, and remanded on other grounds,* 58 F.3d 1005 (4th Cir. 1995) (en banc); *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992) (90-day waiting period not unreasonable). However, considering that the applications must be distributed to other departments for inspections, that the board may only hold the applications for thirty of those days under specified circumstances, and that businesses already established continue operating pending a licensing decision, the Court finds that this waiting period is not unreasonable.

2. Status Quo

However, not only must the waiting period be reasonable, but the status quo must be preserved during that time. *East Brooks Books,* 48 F.3d at 224. The Plaintiffs' second challenge to the ordinance relates to this issue. They claim that the ordinance does not provide for the preservation of the status quo pending judicial review, or in the event that the board fails to issue a timely licensing opinion. The Court agrees. Section 6.54.140 of the ordinance, combined with Section 6.54.020(G)(3) provide for

only a ten-day hiatus before the board's decision takes effect. Section 6.54.140 provides that a license/permit shall be valid until ten days have elapsed since the board's decision, or until a hearing on the matter is held. If at the conclusion of the hearing, the board affirms its denial of license or permit, this decision does not take effect until ten days have elapsed, in order to give the aggrieved party time to file an appeal. Section 6.54.020(G)(3). The ordinance is silent as to whether the effect of a denial is stayed after those ten days pending judicial review. The board's policies are equally silent on this issue. Although Board Policy 40 states that any denial, revocation, or suspension of a license shall not go into effect until thirty days have elapsed since the board's final decision and there has been no appeal, it does not explain what the status of a license is while an appeal is pending.

Furthermore, the ordinance does not specify what the effect would be of the board's failure to act on an application in a timely manner. The Defendants have presented the Court with Board Policy 70, which states in relevant part:

> It shall be the policy of this Board that any license or permit not acted on by the Board in the time allowed by the ordinance, due to any fault on the part of the Board or the Board's administration, shall be granted.

Def's Ex. 2 at 2. However, as the Plaintiffs have pointed out, the policy only relates to failure to act on an application due to fault by the Board. It does not encompass failure to act timely due to failure of, for example, the police or fire department to conduct its investigation within the prescribed thirty days. Moreover, this policy is inconsistent with Section 6.54.020(C)(10), which prohibits

the board from issuing a license "unless the police department has investigated the applicant's criminal history . . . ". Finally, it is unclear from the policy just how a license would be granted if the reason a license has not been issued on time is that the board has not been able to meet or to form a quorum.[4] Without any action on the past of the board, the applicant will presumably not have a tangible permit in his or her possession.

3. Judicial Review

Lastly, the Plaintiffs contend that the ordinance is invalid because it fails to provide for prompt judicial review. Again, the Court agrees with the Plaintiffs. Under the ordinance as written, an applicant can be required to wait for an indefinite period of time before obtaining judicial review of the board's decision. After a hearing is requested, the applicant should receive a hearing in fourteen days, since the board holds meetings bimonthly. § 6.54.020(D)(1). The board must then notify an applicant of the denial of his or her license within ten days after a meeting is conducted. The ordinance specifies that the applicant can then appeal from an unfavorable decision at a hearing directly to the Chancery Court of Davidson County through a petition for a writ of certiorari. § 6.54.160. The administrative record must be transmitted to the court within ten days of the hearing, § 6.54.160, however, a hearing before the court must wait at least ninety days in order to allow for the filing of a brief, response, and reply brief. Davidson County Local Rule

[4] Board Policy 20 requires that a quorum must be present in order for the board to take action.

§ 30.02. Although the appeal would at that point have precedence over other matters before the court, the scheduling of a hearing is dependent on the court's docket. Thus, the Plaintiffs are not guaranteed judicial review within any specified period of time. Moreover, the state chancellor is not required to issue an opinion within any mandated period of time. *See* Tenn. Code Ann. § 27-9-111.

The circuits are currently split with respect to the meaning of "prompt judicial review." The First, Fifth, and Seventh Circuits have concluded that access to a judicial proceeding is sufficient to constitute prompt judicial review. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1220 (1996). Conversely, the Fourth, Sixth, and Eleventh Circuits have required a prompt judicial *determination. Id.* at 1241-42. In *East Brooks Books,* the Sixth Circuit concluded that a potential wait of over five months before a judicial ruling was impermissible. 48 F.3d at 225. It further determined that the possibility of appeal to the Tennessee state courts through a writ of certiorari did not constitute prompt judicial review precisely because this procedure did not require the courts to issue a ruling within any specified period of time. *Id.* The ordinance at issue in the present case allows for up to fifteen days for the board to hold a hearing (one day to request and fourteen days for the hearing to be held), ten days before the denial is mailed to the applicant, ten days for the board to forward a copy of the proceedings before it to the court, and a wait of at least ninety days before a state court can issue a ruling. The applicant must thus wait at least three and one-half months minimum before a court issues a ruling on its application. However, since

there are no time restraints on the court's issuance of a decision, potential delays of over five months are possible under this statute. *East Brooks Books* prohibits this kind of delay. *See also Smith v. City of Clarksville,* No. 3-94-0539 (M.D. Tenn. Mar. 14, 1996) (invalidating a licensing scheme similar to the one at issue because it failed to provide for expeditious judicial review).

The Defendants offer three possible ways to rehabilitate this ordinance. First, they contend that under the local rules, it is possible for an applicant to move the Chancery Court for an expedited briefing schedule, and pursuant to Local Rule 18.01[5], move the court to set an early trial date. They contend that while Tenn. Code Ann. § 27-9-111 provides that in appeals of board determinations, the court shall set a trial ninety days after the board files a transcript of the proceedings before it, and that the trial shall have precedence over other litigation, this statute does not *require* a court to wait ninety days before setting a case for trial. They further assert that to the extent that it does mandate this, it violates the separation of powers doctrine, as it infringes upon the court's ability to set its own docket. *See Summers v. Thompson,* 764 S.W.2d 182, 188-190 (Tenn. 1988) (Drowota, J., concurring) (discussing generally the respective powers of the judiciary and the legislature). However, it is clear that the Defendants' proposed method of judicial review would not set clear boundaries on the time that a court must make a

[5] The rule provides: "Cases shall be set for trial in one of the following ways: (a) by agreement of counsel after consultation with the Calendar Clerk for Chancery and Probate Court or the Assignment Clerk for Circuit Court; (b) by motion; or (c) by the court with notice to counsel."

decision, and thus does no pass constitutional muster under *East Brooks Books*.

Second, the Defendants contend that, unlike the ordinance in *Smith v. City of Clarksville,* the ordinance at issue does not require that any appeal be processed through a writ of certiorari at the state level. Although the ordinance at hand does provide that an applicant may "choose" to appeal to the state through a writ of certiorari, § 6.54.100(M), the ordinance by its terms does not foreclose other methods of appeal. Specifically, the Defendants maintain that an applicant can appeal by petitioning for a temporary restraining order ("TRO") and preliminary injunction. However, again, the Defendants have not directed the Court to any rule which requires a court to decide a motion for a TRO or preliminary injunction within any prescribed period of time. Thus, this procedure suffers from the same infirmities as a petition for writ of certiorari.

Finally, the Defendants have submitted to the Court Proposed New Local Rule, § 30.05, which provides that:

> If the petitioner-appellant alleges that the decision of an administrative tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

However, the proposed rule suffers from several problems, the most important of which is that it is a *proposed* rule,

and there is no guarantee that it will be adopted by the courts. Furthermore, the text of the rule is unclear, as it does not specify exactly *what* must be done in fourteen days: the scheduling of a hearing, and adjudication, or both. Thus, the Court cannot conclude that this local rule meets the expeditious judicial review requirements of the First Amendment. That aside, it appears to the Court that this kind of rule is exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine. Although the legislature may not be able to require the courts to decide a matter within a prescribed period of time, the directives of the First Amendment may still be met if an ordinance provides that a permit or license should issue in the event that the court does not adjudicate a matter within a given time (which must be less than five months per *East Brooks Books*.

4. Disabling Provisions

Because the Court has determined that the ordinance is unconstitutional because it does not preserve the status quo or provide for prompt judicial review, it does not need to reach the issue of whether the disabling provisions of the ordinance are unconstitutional.

B. Irreparable Harm

Nonobscene nude dancing is constitutionally-protected activity within the scope of the First Amendment. *Barnes v. Glen Theatres. Inc.*, 501 U.S. 560, 565-66 (1991); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. The ordinance, if allowed to take effect, would condition the Plaintiffs exercise of their First Amendment freedoms on the receipt of a license, and would prohibit

them from exercising this right without a license. It is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

The Defendants have urged this Court to find that there is no immediate irreparable injury because operators do not even have to file an application until March of next year, and although entertainers must file their applications by November 15th of this year, the board will not rule on their applications until, at the earliest, fifty days later. However, in the case of entertainers, the mere fact that they have to file an application infringes on their First Amendment freedoms, since the application requires them to submit a picture, a list of prior employers, prior addresses, and prior convictions of a sexual nature or involving moral turpitude. Furthermore, since the ordinance is already in effect, operators are already subject to it and live under the threat of having to submit licenses to the board. The Court finds that this is sufficient immediate irreparable harm for it to enjoin the provisions of the ordinance relating to operators.

C. Public Interest

The Court finds that the issuance of an injunction at this point would be in the public interest: it "is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.,* 23 F.3d at 1079. Although it is also in the public interest to ameliorate the harmful side effects that sexually-oriented businesses may promote, as specified in the preamble to the ordinance, it

is not in the public interest to do this through a statute that violates an individual's First Amendment rights.

D. Possibility of Substantial Harm to Others

There is very little possibility of substantial to others if the injunction is not issued. Although the ordinance is directed at curtailing certain crimes and health hazards which are the "secondary effects of adult entertainment establishments," *see* Bill No.097-796, there are other means of regulating these effects that will continue to operate while the injunction is in effect, for example, the police and fire departments.

III. CONCLUSION

The Court finds that the ordinance must be enjoined in its entirety because it fails to maintain the status quo while an initial determination of the board is pending, and does not provide for prompt judicial review. Although the ordinance is severable, § 56.54.170, the fact that it fails to provide expeditious judicial review requires the Court to invalidate it in its entirety, as none of the provisions are salvageable. Accordingly, the Metropolitan Government of Nashville and Davidson County Tennessee, and Emmett Turner, Chief of Police, are enjoined from enforcing any of the provisions of this ordinance until otherwise directed by this Court.

An order consistent with this memorandum will be filed contemporaneously.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

No. 03-6521

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., A TENNESSEE CORPORATION, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	)	(Filed Dec. 16, 2005)
Defendant-Appellant.	)	

BEFORE: BOGGS, Chief Judge; ROGERS, Circuit Judge; and SHADUR,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

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* Hon. Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Clerk
Leonard Green, Clerk
[illegible]

U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

C.R.C.P. Rule 106

RULE 106. FORMS OF WRITS ABOLISHED

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon

the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating

portions of the record not set forth in the order which it desires to place before the Court. The cost of preparing the record shall be advanced by the plaintiff, except that the Court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the Court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the Court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The Court may accelerate or continue any action which, in the discretion of the Court, requires acceleration or continuance.

(IX) In the event the Court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the Court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.

Current with amendments received through December 15, 2005

U.S.C.A. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support

the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

T.C.A. § 27-9-111 (2002)

27-9-111 Hearing – Findings.

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

[Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3; 1998, ch. 794, § 1; 2002, ch. 615, § 1.]

Compiler's Notes. The portion of this section which requires that proof at a hearing be taken by deposition has been superseded by Tenn. R. Civ. P. 43.01 which provides that witnesses shall give testimony orally, under oath, in open court.

Acts 2002, ch. 615, § 2 provided that the 2002 amendment to (e) shall not take effect until such time as the United States Supreme Court has denied the petition for a writ of certiorari filed by the Metropolitan Government of Nashville and Davidson County in the case of DejaVu, Inc. v. Metropolitan Government, 274 F.3d 377 (6th Cir. 2001), or if the Untied States Supreme Court grants a writ of certiorari, the 2002 amendment shall not take effect until such time as the United States Supreme Court affirms the Sixth Circuit's opinion on the issue of "prompt judicial review." If the United States Supreme Court reverses the Sixth Circuit's opinion on "prompt judicial review" the amendment shall never take effect. On May 13, 2002, the United States Supreme Court denied the petition for a writ of certiorari. Metropolitan Government of Nashville and Davidson County, et al. v. DejaVu of Nashville, Inc., et al., 122 S.Ct. 1952, 152 L.Ed.2d 855.

Amendments. The 2002 amendment inserted "shall immediately grant the writ of certiorari and" in the first sentence of (e).

Effective Dates. Acts 2002, ch. 615, § 2. May 13, 2002.

T.C.A. § 27-9-111 (1998)

27-9-111 Hearing – Findings.

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

[Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3; 1998, ch. 794, § 1.]

Compiler's Notes. The portion of this section which requires that proof at a hearing be taken by deposition has been superseded by Tenn. R. Civ. P. 43.01 which provides that witnesses shall give testimony orally, under oath, in open court.

Amendments. The 1998 amendment added (e).

Effective Dates. Acts 1998, ch. 794, § 2. April 23, 1998.

T.C.A. § 27-9-111 (1997)

27-9-111 Hearing – Findings.

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

[Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3.]

Title 6, Metropolitan Code of Laws
Ch. 6.54 (1999 Version)

Chapter 6.54

SEXUALLY ORIENTED BUSINESSES

Sections:

6.54.010	**Definitions.**
6.54.020	**Sexually oriented business licensing board.**
6.54.030	**License required.**
6.54.040	**Application for license.**
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6.54.130	**Responsibilities of the operator.**
6.54.140	**Prohibitions and unlawful sexual acts.**
6.54.150	**Revocation or suspension of license/ permit.**
6.54.160	**Penalties and prosecutions.**
6.54.170	**Invalidity of part.**

6.54.010 Definitions.

For the purpose of this chapter, the words and phrases used in this chapter shall have the following meanings, unless otherwise clearly indicated by the context:

A. "Aggravated rape" means as defined in the Tennessee Code Annotated Section 39-15-502.

B. "Aggravated sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-504.

C. "Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

D. "Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

E. "Employee" means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually oriented business.

F. "Entertainer" means any person who provides live entertainment within a sexually oriented business as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not

entertainment is provided as an employee or an independent contractor.

G. "Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1999.

H. "Indecent exposure" means as defined in the Tennessee Code Annotated Section 39-13-511.

I. "Location" means a single site for which only one use and occupancy permit would be required.

J. "Metropolitan area" means the general services district of the metropolitan government of Nashville and Davidson County.

K. "Metropolitan council" means the legislative body of the metropolitan government of Nashville and Davidson County, Tennessee.

L. "New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

M. "New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1999.

N. "Obscenity" means as defined in the Tennessee Code Annotated Sections 39-17-901(10) through (14).

O. "Operator" means any person, partnership, or corporation operating, conducting or maintaining a sexually oriented business.

P. "Patronizing prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

Q. "Promoting prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

R. "Prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

S. "Public indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.

T. "Rape" means as defined in the Tennessee Code Annotated Section 39-15-503.

U. "Rape of a child" means as defined in the Tennessee Code Annotated Section 39-15-522.

V. "Sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-505.

W. "Sexual exploitation of a minor" means as defined in the Tennessee Code Annotated Sections 39-17-1003, 39-17-1004 and 39-17-1005.

X. "Sexually oriented" means any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."

Y. "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis

on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein. "Sexually oriented business/establishment" also means any commercial establishment to which the public, patrons or members are invited or admitted and which are so physically arranged as to provide booths, separate from the common areas of the premises for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos.

1. "Sexually oriented bookstore" means an establishment having a majority of its stock in trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. "Sexually oriented nightclub" means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

3. "Sexually oriented theater" means an enclosed building regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

4. "Sexually oriented video store" means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

a. "Sexually oriented videos" means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

Z. "Sexually oriented entertainment" means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified

anatomical areas" as defined in this section for observation by patrons therein.

AA. "Specified anatomical areas" means:

1. Less than completely and opaquely covered:

a. Human genitals, pubic region,

b. Buttocks,

c. Female breasts below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered.

BB. "Specified sexual activities" means:

1. Human genitals in a state of sexual stimulation or arousal:

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

CC. "Statutory rape" means as defined in the Tennessee Code Annotated Section 39-15-506. (Amdt. 1 § 1 with Ord. 99-1503 §§ 1-3, 1999; Ord. 97-1022 § 1, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 3 §§ 1 and 2 with Ord. 97-796 § 2 (part), 1997)

6.54.020 Sexually oriented business licensing board.

A. Establishment. A sexually oriented business licensing board is created and designated the metropolitan

sexually oriented business licensing board (herein "board").

B. Membership – Terms.

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the unexpired term.

C. Election of Officers – Term. The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen.

D. Meetings – Quorum Required – Minutes and Transcript.

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary.

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4. No transcript of the proceedings had before the board shall be in any form other than narrative, unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and Duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all sexually oriented establishments as provided in this chapter, located in the metropolitan area.

2. The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the Metropolitan Charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board.

F. Inspectors – Authority. The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any civil service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G. Procedures for Hearings. This section shall apply to all hearings by the board including but not limited to hearings for revocation, suspension or denial of a license/permit.

1. Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5. A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days. Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision. (Amdt. 1 § 14 with Ord. 99-1503, 1999; Ord. 97-1022 § 3, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.030 License required.

A. Except as provided in subsection F of this section, from and after March 1, 1999, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership or corporation which desires to operate more than one sexually oriented business must have a license for each establishment.

C. Only one license may be issued for each sexually oriented business location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It is unlawful for any entertainer or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business. It is unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business while sexually oriented entertainment is being presented.

F. All existing sexually oriented businesses, as defined in Section 6.54.010, must submit an application for a license by March 15, 1999, or cease operations. All

existing sexually oriented businesses which apply for a license by March 15, 1999, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.040(E)(3). All new sexually oriented businesses, as defined in Section 6.54.010, may submit an application at any time but may not operate until a license is granted except as permitted in Section 654.040(E)(4). (Ord. 99-1503 §§ 4, 5, 1999; Ord. 97-1022 § 5, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.040 Application for license.

A. Application.

1. Any person, partnership, corporation or any other entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to: the police department, the department of codes administration, the health department, and the applicant.

2. Application forms shall be available at the office of the board.

3. The application form shall include all the information indicated in subdivisions (5)(a) through (5)(l) of this subsection.

4. The following persons must be listed in the license application for any sexually oriented business: any partner of a partnership who will participate in the day-to-day

operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will participate in the day-to-day operation of the business.

5. The applicant shall furnish the following information under oath:

a. Name and address of the applicant, including all aliases (business address is sufficient);

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business license/permit or similar business license/permit. Whether the applicant has ever had such a license/permit revoked or suspended, within the last two years from the date of application, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

e. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

f. All judgements by a court within the past two years for violations of the metropolitan zoning Section 17.64.26;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

h. The address of the sexually oriented business to be operated by the applicant;

i. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation of the business;

j. If the applicant is a partnership, joint venture, or any other type of business, the application shall specify the name and address of all persons who will be involved in the day-to-day operation of the business;

k. A statement by the applicant that he/she is familiar with the provisions of this chapter and is in compliance with them.

6. If the applicant intends to have booths on the premises for the purpose of viewing sexually oriented movies, sexually oriented films, or sexually oriented videos, then in addition, the applicant shall provide the board, with his/her application, a diagram, drawn to scale, of the premises including the location and layout of all booths and the location of the clerk/manager's stand or

counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

B. Inspections and Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1) of this chapter. The health department shall inspect the premises to insure compliance with applicable health code statutes. ordinances, and regulations. The police department shall investigate the applicant's criminal history collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no sexually oriented business/adult entertainment zoning code violations and/or no applicable criminal history. Subject to Section 6.54.150.

2. If a diagram is required to be submitted under subsection (A)(6) of this section, then the code inspector shall confirm the layout of the booths complies with the submitted diagram and the requirements set out in Section 6.54.050A.

3. The police department shall complete its investigation and the codes department and health department

shall complete their respective inspections and shall communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:

> The location at _____ complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.
>
> The location at _____ does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.

The writing from the police department shall end with substantially the following statement:

> The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes of a sexual nature:
>
> Name Crime Date

4. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection and Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department and the

inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this code section and the applicable health statutes, ordinances and regulations.

2. If the board determines that the applicant is in compliance with the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in Section 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application, then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

3. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

4. In the event the board denied the application in accordance with Section 6.54.050(B)(2), such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a license for one year from the date the citation was sustained. A violation of the zoning code shall be evidenced by

a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant until the judgement is reversed.

6. Any investigation reports or inspection reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.-

7. If a diagram is required under subsection (A)(6) of this section and based on the code inspection, the board determines that the actual structure does not comply with Section 6.54.050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied in accordance with Section 6.54.053(A) and (B).

8. If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.050(B)(3). False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this code section, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to comply with applicable statutes, ordinances and

regulations. This notice shall specify the violation. If the applicant can come into compliance as described in subsection D of this section, the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request reinspection or request an extension of time.

10. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (C)(1) of this section, unless otherwise agreed to by the applicant.

11. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

12. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his/her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate

with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(10) of this section.

D. Extensions of Time for the Applicant.

1. If the license is denied under subsection (C)(5) or (C)(7) of this section, the applicant may reinstate his/her application by notifying the board in writing that he/she has come into compliance and requests reinspection.

a. The applicant has fifteen days from the mailing of the denial described in subsection (C)(5) or (C)(7) of this section to cure the violation and notify the board or to request an extension pursuant to subsection (D)(2) of this section. The applicant has the responsibility to contact the board.

b. Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

c. Upon notification by the board, the appropriate inspector shall return to the location for reinspection and shall submit another written report as indicated in subsection (B)(3) of this section. The inspector has five days from the date he/she was notified by the board to reinspect the premises and inform the board as to whether the applicant has come into compliance in the same manner described in subsection (B)(3) of this section and using the same language required in subsection (B)(3) of this section.

d. Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance,

and if so the board shall issue the license at the next regular meeting. The next meeting shall be held no later than fifteen days after the inspection report is filed with the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in subsection (C)(6) of this section.

e. If the applicant fails to either contact the appropriate inspector to report that the code violations have been corrected, or if the code violations have not been corrected, then the application is denied in accordance with subsection (C)(5) or (C)(7) of this section.

2. If the process of curing the violation requires more time than that provided in subsection (D)(1) of this section, the applicant may request an extension from the board. If the applicant does not make such a request in the time allotted, the application is denied in accordance with subsections (C)(5), (C)(7) or (D)(3) of this section.

a. The request for an extension must be made in writing within five days from the denial described in subsection (C)(5) or (C)(7) of this section.

b. The board shall hear the applicant's request for an extension at the next regular meeting. The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

c. The hearing on the extension shall follow the same rules as set out in Section 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

d. An extension shall only be granted when the codes inspector and the health inspector agree that an extension

will not endanger the health or safety of the community and the board determines that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in this subsection then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the denial described in subsections (C)(5) and (C)(7) of this section shall be treated as a denial of the application.

E. Denial of the License Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's notification.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

2. Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For an existing sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed

to a court, and if the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 654.150(A)(8). (Amdt. 1 §§ 2, 3 with Ord. 99-1503 §§ 6-30, 1999; Ord. 97-1022 §§ 6-39, 1997; amended during 9-97 supplement; Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.050 Standards for issuance of license.

A. Physical Layout of Sexually Oriented Business.

1. Any sexually oriented business having available for customers, patrons or members any booth, for the viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos, shall submit a diagram under Section 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

a. Access. Each booth shall be totally accessible to and from aisles and public areas of the sexually oriented business and shall be unobstructed by any door, gate, lock or other control-type devices.

b. Construction. Every booth shall meet the following construction requirements:

i. Each booth shall be separated from adjacent booths and any nonpublic areas by a solid or opaque wall;

ii. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same;

iii. All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

iv. The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

v. The lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor.

c. Occupants. Only one individual shall occupy a booth, at any time. No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

2. The provisions enunciated in subdivision 1 of this subsection shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, sexually oriented videos.

B. Applicant.

1. To receive a license to operate a sexually oriented business, an applicant must meet the following standards:

a. If the applicant is an individual, the applicant shall be at least eighteen years of age;

b. If the applicant is a corporation, all officers, directors and stockholders required to be named under Section 6.54.040(A)(5)(i) shall be at least eighteen years of age;

c. If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest, all persons having a financial interest in the business and who are involved in the day-to-day operation of the business shall be at least eighteen years of age.

2. No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a license for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the conviction by the trial court to the date of the application. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading

information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 654.010, then the applicant shall not be eligible to receive a license until the time period described in subsection (B)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

d. If the misleading statements or omissions referred to violations of Section 17.36.260 of the zoning code, then the applicant shall not be eligible to receive a permit until the time period described in subsection (B)(5) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. An applicant having had a sexually oriented business/establishment license or similar license/permit revoked within the last year shall not be eligible for a license for one year from the date of revocation.

5. No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant until the trial court's judgement is reversed.

6. If the applicant plans to have or has booths, for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos, then the booths must comply with the requirements set out in subsection A of this section. (Ord. 99-1503 §§ 31-49, 1999; Ord, 97-1022 §§ 40-45, 1997; amended during 9-97 supplement; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.060 Permit require.

A. Except as provided in subsection B of this section, from and after March 1, 1999, no person shall be an entertainer in a sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

B. All current entertainers, as defined in Section 6.54.010, wishing to continue to perform sexually oriented entertainment must submit an application for a permit by March 15, 1999. All current entertainers, who apply for a permit by March 15, 1999, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as permitted in Section 6.54.070(D)(4). (Ord. 99-1503 § 50, 1999; Ord. 97-1022 §§ 46, 47, 1997; Amdt. 7 (part) and Amdt. 6 § 7 with Ord. 97-796 § 2 (part), 1997)

6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The applicant shall file the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville police department and the applicant.

2. Application forms shall be available at the office of the board. Applicants may obtain their application from the codes department. Applicants must also submit with each application two 2 x 2 photos.

a. · Background Check. All background checks shall be completed by the metropolitan police department. The police department may be notified of a need for a

background check in two ways. The applicant brings her application, including one of the two photos to the police department and has her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.

b. Fingerprints. The applicant may have his/her fingerprints completed by the police department or other qualified person.

c. Fees. If the applicant brings her application to the police department, the police department shall not charge the applicant any additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department that it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give them to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the one hundred dollar permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints taken by a qualified person other than the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

3. The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

4. The applicant shall furnish the following information under oath:

a. Name and address including all aliases;

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. The applicant's height, weight, color of eyes, and hair (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

e. Whether the applicant previously entertained in this or any other county, city, or state under a sexually oriented business license/permit or similar business license/permit within the two last years. For whom the applicant was employed or associated at the time. Whether the applicant has had such a license/permit revoked or suspended within the two last years and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in

Section 6.54.010, punishable as a felony that have occurred within the past five years;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature); and

h. A statement by the applicant that he/she is familiar with the provisions of this chapter and is in compliance with them.

B. Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history. Subject to Section 6.54.150.

C. Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6.54.010, has not had a similar type of permit/license revoked in the last two years, is at least eighteen

years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant by United States mail to the address listed on the application.

3. In the event the board denied the application in accordance with Section 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

4. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

5. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.080. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

6. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or the revocation of a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (D)(1) of this section, unless otherwise agreed to by the applicant.

7. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter. shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(6) of this section.

D. Denial of the Permit Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

2. Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that

decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new entertainer, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 654.150(C)(8).

E. The permit carried by the entertainer shall contain only the following information:

1. A photo identification as provided by the applicant;

2. A computer-generated number assigned to each applicant, corresponding to the file maintained on each applicant by the sexually oriented business licensing board; and

3. The applicant's date of birth as indicated on the application. (Amdt. 1 §§ 4-7 with Ord. 99-1503 §§ 51-64, 1999; Ord. 97-1022 §§ 48-62, 1997; amended during 9-97

supplement; Amdt. 7 (part), Amdt. 6 § 5 (part) and Amdt. 1 with Ord. 97-796 § 2 (part), 1997)

6.54.080 Standards for issuance of a permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year

from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 654.010. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a permit until the time period described in subsection (A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. The applicant shall not have had a sexually oriented business permit/license or similar business permit revoked within the last year immediately preceding the application. (Amdt. 1 § 8 with Ord. 99-1503 §§ 65-70, 1999; Ord. 97-1022 § 63 (part), 1997)

6.54.090 Fees.

A. A license fee of five hundred dollars shall be submitted with the application for a license. If the application is denied, one-half of the fee shall be returned

B. A permit fee of one hundred dollars shall be submitted with the application for a permit. If the application is denied, one-half of the fee shall be returned. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.1.00 Display of license or permit

A. The license shall be displayed in a conspicuous public place in the sexually oriented business.

B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be returned to the board and cease to be valid. (Ord. 99-1503 §§ 67(2), 71, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.110 Renewal of license or permit.

A. Every license/permit issued pursuant to this chapter will terminate at the expiration of one year from the date of issuance unless sooner revoked and must be renewed before operation the following year.

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board. The application for renewal must be filed not later than sixty days before the license/permit expires. The original application for renewal plus the number of copies listed in Section 654.040A or 6.54.070A shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application.

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E. The renewal form shall be the same form described in Section 6.54.040A for a license and Section 6.54.070A for a permit except as indicated below in subsection H of this section.

F. For a renewal, the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year. The renewal must also include an updated background check by the police department and an updated 2 x 2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

G. If the applicant chooses to only include information concerning items which have changed, he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in Section 654.040A for a license or Section 6.54.070A for a permit except the final line shall state:

> I swear the information I have given in the application from 199___ is still accurate and any facts or circumstances which have changed are indicated in this application for a renewal of the license/permit.

_____

signature of applicant

I. A license renewal fee of five hundred dollars shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars shall be assessed against the applicant who files for a renewal less than sixty days before the license expires. If the renewal is denied, one-half of the fee collected shall be returned.

J. A permit renewal fee of one hundred dollars shall be submitted with the application for renewal. In addition to such renewal fee, a late penalty of fifty dollars shall be assessed against the applicant who files for renewal less than sixty days before the permit expires. If the renewal is denied, one-half of the fee shall be returned.

K. The application for a renewal is subject to the same rules and limitations as the initial application.

L. When an application for renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.

1. The request shall be in writing and filed with the board within five days of the board's decision.

2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing state the reasons for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a

license/permit then that license/permit shall be revoked in accordance with Section 6.54.150(A)(8) and (C)(8). Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

M. The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari. (Amdt. 1 § 9 with Ord. 99-1503 §§ 72, 73, 1999; Ord. 97-1022 §§ 63 (part), 64-68, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.120 Hours of operation.

A. All sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays.

B. All public areas of every sexually oriented business shall be open to inspection at any time during normal business hours by the following departments: police, codes, board inspector, and health. (Ord. 99-1503 § 74, 1999; Ord. 97-1022 § 63 (part), 1997; Amdt. 7 (part) and Amdt. 6 § 8 with Ord. 97-796 § 2 (part), 1997)

6.54.130 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this chapter shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, renewed or a penalty assessed subject to the limits described in Section 6.54.150(E).

B. No employee on the premises for furthering the business, but not including independent contractors on the premises for repairs and construction, of a sexually oriented business shall allow any minor to loiter around or to frequent a sexually oriented business or to allow any minor to view sexually oriented entertainment as defined herein on the premises of a licensed business.

C. Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths, wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further, any wall forming any portion of the booths, shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with Section 6.54.050A.

D. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth, or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

E. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County, Chapter 6.54 which provides that no customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.

F. It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time that any patron is permitted access to any booth.

G. It shall be the duty of the operator and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or

construction, to ensure that the illumination in booths, described in Section 6.54.050(A)(1)(b)(v) is maintained at all times that any patron is present on the premises.

H. No operator shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

I. The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered. (Amdt. 1 § 10 with Ord. 99-1503 §§ 75-84, 1999; Ord. 97-1022 §§ 63 (part), 69-73, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.140 Prohibitions and unlawful sexual acts.

A. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, of a sexually oriented business shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises.

B. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall

encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any entertainer, operator or employee.

C. No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer. (Ord. 99-1503 §§ 85-87, 1999; Ord. 97-1022 § 63 (part), 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 §§ 3, 4 and Amdt. 4 with Ord. 97-796 § 2 (part), 1997)

6.54.150 Revocation or suspension of license/permit.

A. The board shall revoke a license for any of the following reasons:

1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence should have known that licensee was employing,

an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known the he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent,

his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on

the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous Violations of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed.

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 724.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, Tennessee Code

Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove as a defense to the alleged violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the licensee shall either be fined five hundred dollars or his/her license shall be suspended for a period no less than five days and no longer than thirty days or the licensee shall be both fined five hundred dollars and his or her license suspended for a period of not less than five days and no longer than thirty days.

3. Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the license shall be suspended no less than thirty-one days and no longer than ninety days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the

board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The permittee has become ineligible to obtain a permit under Section 6.54.080A;

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells,

furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four months not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permittee shall either be fined five hundred dollars or his or her permit shall be suspended for a period no less than five days and no longer than thirty days or the permittee shall be both fined five hundred dollars and his or her permit suspended for a period of no less than five days and no longer than thirty days.

Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permit shall he suspended no less than thirty-one days and no longer than ninety days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under Section 6.54.150(A)(7), (8) and Section 6.54.150(C)(7), (8) of this chapter.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting. The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 1 §§ 11-13 with Ord. 99-1503 § 88, 1999)

6.54.160 Penalties and prosecutions.

A. Any individual, partnership or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. Five hundred dollars for each offense; and/or

2. A suspension of any license/permit for a specified period of time for each offense listed in Section 6.54.150B or D; or

3. Revocation of any license/permit for any conduct listed in Section 6.54.150A or C.

B. The penalty of suspension may not be combined with revocation. A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this chapter shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation. (Ord. 99-1503 §§ 89, 90, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.170 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

Department of State

To all to whom these Presents shall come, Greeting:

I, Riley C. Darnell, Secretary of State of the State of Tennessee, do hereby certify that the annexed is a true copy of

PUBLIC CHAPTER NO. 794

HOUSE BILL NO. 2926

PUBLIC ACTS OF 1998

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I have hereunto subscribed my Official Signature and by order of the Governor affixed the Great Seal of the State of Tennessee at the Department in the City of Nashville, this 23rd *day of* April, *A.D. 1998*

/s/ Riley C. Darnell

PUBLIC CHAPTER NO. 794

HOUSE BILL NO. 2926

By Representatives Robinson, Buck

Substituted for: Senate Bill No. 2634

By Senator Haynes

AN ACT to amend Tennessee Code Annotated, Section 27-9-111, relative to judicial review of certain final orders or judgments of a board or commission by requiring the hearing and adjudication of the cases within a specified period.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 27-9-111, is amended by adding the following language as a new, appropriately designated subsection:

> ( ) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven (7) days of the grant of the writ of certiorari.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

HOUSE BILL NO. 2926

PASSED: APRIL 9, 1998

/s/ Jimmy Naifeh
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

/s/ John S. Wilder
JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 23rd day of April 1998

/s/ Don Sundquist
DON SUNDQUIST,
GOVERNOR

03-6521

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DÉJÀ VU OF NASHVILLE, INC., a Tennessee corporation; JERRY C. PENDERGRASS, *et al.*

Plaintiffs-Appellees.

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Defendant-Appellant.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PETITION FOR REHEARING AND REHEARING *EN BANC* OF DEFENDANT/APPELLANT THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

JAMES L. CHARLES
Associate Director of Law

FRANCIS H. YOUNG
Metropolitan Attorney

222 Third Avenue North, Suite 501
Nashville, Tennessee 37201
(615) 862-6380

Counsel for Appellant

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Unites States Supreme Court: *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In addition, on the exceptionally important question of whether "special circumstances" exist which would make a sizable award of attorneys' fees to plaintiffs unjust, the panel decision conflicts with the Second Circuit's decision in *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998).

/s/ Francis H. Young
Francis H. Young
Attorney for Defendant/
Appellant
The Metropolitan
Government of Nashville
and Davidson County

INTRODUCTION

This Petition for Rehearing and Suggestion for Rehearing *En Banc* follows the issuance of an opinion on August 31, 2005 (recommended for publication) affirming the trial court's award of attorneys' fees and costs to plaintiffs in the amount of $536,535.22.

The points or questions raised in this Petition are:

1. Do "special circumstances" exist which make the award of attorneys' fees and costs to plaintiffs unjust, as a result of the Supreme Court's decision in *Z.J. Gifts*?

2. Even if the Court determines that Déjà vu[1] is the "prevailing party" for purposes of the first injunction, is an award of approximately $460,000 in attorneys' fees justified for appealing the first injunction and litigating the second injunction, on which Déjà vu's only meaningful success was in having the superfluous term "sexually oriented" severed from Chapter 6.54?

PURPOSE OF PETITION

Very respectfully, the Metropolitan Government believes that the panel misapplied *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In addition, the finding that "special circumstances" did not exist in this case conflicts with *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998).

The purpose of this petition is to seek a ruling that the award of attorneys' fees and costs was not warranted. Alternatively, the Metropolitan Government urges the Court to find that the award of approximately $460,000 of attorneys' fees and costs in incurred in appealing the dissolution of the first injunction and in litigating the second injunction (which solely resulted in the superfluous term "sexually oriented" being severed from the ordinance), to be unjust.

[1] For the sake of convenience, plaintiffs are collectively referred to herein as "Déjà vu."

1. The panel decision conflicts with *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *Farrar v. Hobby*, 506 U.S. 103, 113 (1992); and *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

Even if Déjà vu is considered a "prevailing party" under *Farrar, supra*, the special circumstances of this case make any attorneys' fee award unjust. *Hensley, supra*, at 429.

The "special circumstance" at issue is the Supreme Court's June 7, 2004 opinion in *Z.J. Gifts, supra*. In *Z.J.Gifts*, the Supreme Court clarified what the law is and has been regarding "prompt judicial review." *Z.J.Gifts*' central holding is that ordinary state review procedures provide constitutionally adequate "prompt judicial review" of local governments' decisions to deny licenses for adult businesses. *Id.* at 782-84. The Court stated:

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally left for case-by-case determination rather than a facial challenge. *Z.J. Gifts*, at 781-82.

The Supreme Court continued:

> First, ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to 'accelerate' proceedings. (Citation omitted). And higher courts may quickly review adverse lower court decisions. (Citation omitted).

> Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. *Id.* at 782.

In marked contrast, in its opinion on the merits of this case, this Court held:

> Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim as required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]. *Déjà vu of Nashville,Inc. v. Metropolitan Government*, 274 F.3d 377, 401 (6th Cir. 2001).

This Court then cited with disapproval to the affidavit from the Clerk and Master of the Davidson County Chancery Court which states, in part:

> "generally, our office processes all petitions for a writ of *certiorari* . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are guaranteed prompt judicial review. *Id.*, at 402.

Respectfully, the Clerk and Master's affidavit is exactly the proof of "ordinary court procedural rules and practices" which the Supreme Court in *Z.J.Gifts* found to satisfactorily guard against "delay-induced First Amendment harm," yet this Court found it insufficient. As noted by the Supreme Court in *Z.J.Gifts*, there was also no evidence in that case of "any special Colorado court-related problems [regarding such delay-induced First Amendment

harm]." *Id.* at 782. The same is true of the instant case. Whether any such problems ever actually arise are "matter[s] normally fit for case by case determination, rather than a facial challenge." *Id.*

Very respectfully, the panel majority is mistaken in its reliance on the 2002 amendment to T.C.A. 27-9-111(e) as determinative in defeating a claim of "special circumstances." Slip op. at 6, n. 3. As a result of *Z.J. Gifts*, in which the Supreme Court clarified what the law of "prompt judicial review" is and has been, the 2002 amendment to T.C.A. § 27-9-111(e) was not needed in the first place. That amendment, in which the phrase "shall immediately grant the writ of certiorari" was added to the first sentence of subsection (e), was unnecessary to provide the type of "prompt judicial review" which *Z.J. Gifts* found constitutionally permissible. (*See* Compiler's Notes to T.C.A. § 27-9-111). The fact is that the Metropolitan Government sought an amendment (based on this Court's ruling on the merits of the case) which it did not need to do, under *Z.J. Gifts*.

Respectfully, the Metropolitan Government is not asking the Court to create a "revisionist history" of this case. While revisiting this Court's decision on the merits of this case is beyond the scope of this attorneys' fees dispute, the Court can, and should, take cognizance of the Supreme Court's pronouncements which clarify what the law is and has been, in matters relevant to the case. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993); See also *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting).

The Supreme Court has made such a pronouncement in *Z.J. Gifts* which directly applies to "prompt judicial

review," the only substantive ground in this case upon which Déjà vu prevailed. Now that the Supreme Court has made clear what the law is governing "prompt judicial review," it is apparent that the 2002 amendment to T.C.A. § 27-9-111(e) was unnecessary.

The panel majority cites to the 2002 amendment of this statute as the impediment to a finding of "special circumstances." Slip op. at 6, n. 3. Since the 2002 amendment has now been shown to be unnecessary it is unjust to rely on it to preclude a finding of "special circumstances" under *Hensley*.

Respectfully, the panel majority's decision that "special circumstances" do not exist in this case contradicts the Second Circuit's holding in *New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998). The Second Circuit anticipated the exact scenario which has come to pass in this case – a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiff prevailed. *Id.* The Second Circuit noted the unjust result which would obtain if parties are awarded attorneys' fees when they would no longer be entitled to prevail on their theory, if the case were to be decided today. *Id.*

Finally, the panel majority noted that the Metropolitan Government at one time advocated a view that only prompt judicial "access" was necessary, yet the Supreme Court in *Z.J. Gifts* held that a prompt judicial "decision" is required. Slip op. at 5. Respectfully, in light of the ultimate holding of *Z.J. Gifts*, that point is immaterial. While the law does require a "prompt judicial decision," the law also allows state court judges the latitude to ensure that such

decisions occur promptly, through customary state court rules and practices. *Z.J.Gifts*, at 782-84. An award of $536,535.22 in attorneys' fees and costs seems particularly unjust, since, under the Supreme Court's analysis in *Z.J.Gifts*, Chapter 6.54 provided prompt judicial review from its initial enactment.

2. Alternatively, the Metropolitan Government should not be assessed attorneys' fees incurred after the first injunction was lifted.

Assuming *arquendo* that the judicial review provisions of Chapter 6.54 did not pass constitutional muster when they were first enacted, the first set of amendments to Chapter 6.54 and the state writ of *certiorari* review statute (T.C.A. § 27-9-111(e)) brought the judicial review provisions into compliance under *Z.J. Gifts*.

As the Court may recall, Déjà vu's first injunction was based on the alleged lack of "prompt judicial review." (*See* the Trial Court's Memorandum granting the first injunction, Apx. 72-89). After this injunction was entered, Chapter 6.54 was amended, as was the state writ of *certiorari* review statute. The Metropolitan Government then moved for dissolution of the injunction, which the Trial Court granted. (*See* the Trial Court's Memorandum granting the motion to dissolve the injunction, Apx. 108-121).

As is clear from the Trial Court's Memorandum dissolving the first injunction, the amended Chapter 6.54 eliminated the Court's concerns regarding the timeliness of administrative decisions whether to grant or deny permits or licenses. Apx. at 115. The Court also noted that the amended writ of *certiorari* statute, T.C.A. § 27-9-111(e), addressed the Court's concerns regarding the issuance of

an opinion within a mandated period of time, by requiring that that all First Amendment cases be heard and decided by a state trial court within 40 days. Apx. 115-116.[2]

As a result, at the time the Court dissolved the first injunction (December 3, 1998), Chapter 6.54 passed constitutional muster. True, this Court reversed the District Judge on this point in the opinion on the merits (274 F.3d 377, at 402-03), which was decided on December 6, 2001. However, on June 7, 2004, the Supreme Court would clarify what the law on "prompt judicial review" is, and what it has been. Under *Z.J. Gifts*, Chapter 6.54 was constitutional from the date of the dissolution of the first injunction.

This makes such a significant award of attorneys' fees in this case so troubling. Assume *arquendo* that the Metropolitan Government owes Déjà vu attorneys' fees for the litigation of the first injunction, which was based on the alleged lack of prompt judicial review. However, from the point that injunction was dissolved, under the *Z.J.Gifts* analysis, the "prompt judicial review" procedures of Chapter 6.54 have been constitutional. Thus, the attorneys' fee generated by Déjà vu in appealing the dissolution of the first injunction, and in litigating the second injunction at the trial an appellate levels was for work which was remarkably unsuccessful. The end result of the entire litigation of the second injunction was a determination that the superfluous term "sexually oriented" should be

[2] The Trial Court here refers to the 1998 amendment to T.C.A. § 27-9-111 which added subsection (e). A copy of the 1998 amendment, Public Chapter 794, § 1, is attached hereto.

severed from the ordinance.[3] 274 F.3d at 389. Respectfully, the Court itself would have severed the term but for the additional problem created by its misapplication of the law on "prompt judicial review." *Id.* at 389, 403.

Respectfully, this Court's opinion on the merits of the "prompt judicial review" issue imposes requirements on the Metropolitan Government which the Supreme Court found unnecessary, based on *Z.J. Gifts.* True, this Court's decision on the merits was final when the Supreme Court decided *Z.J. Gifts* in 2004. However, as a result of *Z.J. Gifts*, now this Court has an opportunity to work substantial justice in this case by declining to award a significant amount of attorneys' fees and costs ($464,429.99) which were incurred due to this Court's misapplication of the law on "prompt judicial review" in the opinion on the merits. 274 F.3d 402-03.

Respectfully, the Metropolitan Government is not asking the Court to create "revisionist history." Slip op. at 6. The Metropolitan Government only seeks a re-apportionment of fees under the law which presently governs the merits of a "prompt judicial review" decision. Now that the Supreme Court has clarified the meaning of "prompt judicial review," it is unjust to award Déjà vu such a significant amount of attorneys' fees and costs to which it would not be entitled, were the case to be decided today.

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[3] Plaintiffs' counsel sought $72,105.23 in attorneys' fees and costs incurred in the trial court to obtain the first injunction. See Apx. at 818 and 864. The rest of the $536,535.22 award ($464,429.99) was for the appeal of the dissolution of the "prompt judicial review" injunction (the first injunction) and for litigating the entire second injunction at the trial and appellate levels.

For the foregoing reasons, the Metropolitan Government respectfully requests *en banc* review, or alternatively a panel rehearing.

Respectfully submitted,

JAMES L. CHARLES # 9007
Associate Director of Law

FRANCIS H. YOUNG # 16554
Metropolitan Attorney
222 Third Avenue North,
Suite 501
Nashville, Tennessee 37201
(615) 862-6380

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U. S. Mail, postage prepaid, to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 13th of September, 2005.

/s/ Francis H. Young
Francis H. Young

99-5071

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DÉJÀ VU OF NASHVILLE, INC., a Tennessee Corporation MICHAEL RUCKER, individually; MICHAEL BUTLER, Individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, Individually; JERRY C. PENDERGRASS; THE 822 CORPORATION; 421 CORPORATION,

Plaintiffs/Appellants,

CAROUSEL AMUSEMENT CENTER, INC., a Tennessee Corporation,

Plaintiff,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMETT TURNER, Chief of Police of the Metropolitan Police Department,

Defendants/Appellees.

FINAL BRIEF OF DEFENDANTS/APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police, are not required to make disclosures set forth in Sixth Circuit Rule 26.1. Chief Turner is sued only in his official capacity, which is the equivalent of a suit against the Metropolitan Government itself. The Metropolitan Government is a political subdivision of the State of Tennessee.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants do not believe oral argument would assist the Court in understanding the issues presented in this limited interlocutory appeal and Defendants therefore waive oral argument.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Now that all corporate plaintiffs' businesses which have applied for licenses have been granted licenses, do these plaintiffs still have standing to challenge the procedural requirements of the ordinance?

II. Is the entertainers' appeal from the dissolution of the first preliminary injunction ripe?

III. Does the ordinance at issue provide for prompt judicial review in the event of an adverse administrative decision?

STATEMENT OF THE CASE

Defendants agree, for the most part, with Plaintiffs' Statement of the Case and have only two additions.

Plaintiffs (Déjà vu of Nashville Inc., Merony Entertainment, Inc. (operating Ken's Gold Club and The Pleasure Palace Inc.), 421 Corporation (operating the Purple Onion I, Purple Onion II, and Madam X), 822 Corporation (operating Metro News)) all received sexually oriented business licenses from the Sexually Oriented Business Licensing Board (hereinafter "Board") on May 26, 1999. All of the businesses affiliated with the corporate plaintiffs which have applied for a license have received one.

Mr. Pendergrass was convicted of the misdemeanor, obscenity, May 22, 1997, in Chattanooga. The ordinance bars persons who have been convicted of a misdemeanor crime of a sexual nature from holding a license for two years from the date of conviction. Nashville, Tenn., Metropolitan Code §6.54.050(B)(2) 1999. Since Mr. Pendergrass' misdemeanor conviction is now more than two years old it is no longer a bar to obtaining a sexually oriented business license under this ordinance. In fact, Metro News, the sexually oriented business affiliated with Mr. Pendergrass, has already been granted a sexually oriented business license, as set forth above.

STATEMENT OF FACTS

Defendants agree, for the most part, with Plaintiffs' Statement of Facts and have only two additions.

Defendants have contested throughout this litigation plaintiffs' assertion that the entertainment and sexually explicit materials they provide constitute protected "speech" and the assertion that the entertainment and sexually explicit materials provided by plaintiffs are "non-obscene."

Should an application (for either a license or a permit) be denied or should a license or permit holder have his/her license/permit suspended or revoked, the applicant may have an administrative hearing before the Board. "When an application is denied, the applicant has the right to request a hearing within five days of the board's notification." Nashville, Tenn., Metropolitan Code §6.54.040(E)(1) 1999.

Alternatively, the applicant may forgo the administrative hearing and proceed immediately to court.

> [M]etropolitan government shall file the record of all proceedings with the court within ten days from the date the Metropolitan Government was served with a petition for a writ of certiorari. Nashville, Tenn., Metropolitan Code §6.54.040(E)(2) 1999.

The ordinance does not limit an applicant's avenues of appeal to the courts.

SUMMARY OF ARGUMENT

The corporate plaintiffs no longer have standing to challenge the procedure used to apply for licenses in accordance with this Court's ruling in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) because all the businesses affiliated with the corporate plaintiffs which have applied for licenses have obtained them. Further, the entertainers' appeal from the dissolution of the first preliminary injunction is not yet ripe because the Metropolitan Government is bound by an Agreed Order not to enforce the ordinance at issue against the entertainers until after the trial court rules on the plaintiffs' second motion for a preliminary injunction.

The dissolution of the injunction by the district court was appropriate because the plaintiffs can no longer satisfy the requirements for an injunction, specifically, success on the merits. The dissolution of the injunction by the district court was appropriate because the amendments to the ordinance and to the Tennessee statute governing certiorari review (Tenn. Code Ann. § 27-9-111) (Supp. 1998) provide for maintenance of the status quo and prompt judicial review.[1] Prompt judicial review is maintained both by the statute and by the ordinance itself. The statute provides for a decision on the merits within forty (40) days from the granting of the writ of certiorari and the ordinance itself provides that "If the court fails to rule within forty days of the filing of an appeal, a license shall issue." Nashville, Tenn., Metropolitan Code §6.54.040(E)(3) 1999. Therefore, the decision of the district court dissolving the injunction should be upheld.

Plaintiffs' argument that the certiorari process itself fails to provide an appropriate level of judicial review has no merit.

ARGUMENT

I. The Corporate Plaintiffs Do Not Have Standing to Challenge the Procedure To Obtain A License.

This Court has already held in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997), that sexually oriented businesses which have obtained a license to operate do not have standing to object to the licensing

[1] Since plaintiffs do not allege that the status quo is not maintained by the ordinance, this issue will not be discussed further.

procedures. In *DLS, Inc.*, This Court was faced with review of two aspects of the ordinance's licensing scheme: 1) the procedural system prescribed by the ordinance for the award or denial of licenses and 2) the substantive standards for the award of licenses or permits under Chattanooga's City Code. *Id.* at 413. In its decision this Court stated,

> We reach a result opposite to that of the district court; we believe that the plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but lack standing to challenge the licensing scheme. Only DLS and its owner, Ann Martin, could have standing to challenge the license procedures . . . Both DLS and Martin, however, already have succeeded in obtaining a license under §§ 11-424 and 11-425. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under §§ 11-431 or 11-432. Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III:
>
> > (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;
> >
> > (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court;

> and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.
>
> *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1074 (6th Cir.1994), quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 2302, 124 L.Ed.2d 586 (1993). Any modification to the licensing scheme would have no effect on the potential threat that DLS or Martin face under renewal or revocation proceedings.

Id. at 413-14. Similar to *DLS, Inc.*, all businesses that have applied for a license[2] have received one – Purple Onion I, Purple Onion II, Madam X, Metro News, Ken's Gold Club, Déjà vu and Pleasure Palace. *See* R. 157, Notice of Filing dated June 7, 1999, Appx. at 343.

Unlike the plaintiffs in *DLS, Inc.*, neither the business plaintiffs nor the entertainer plaintiffs have placed before this Court the issue of whether or not a prior restraint exists as to renewals or revocations. Plaintiffs' first motion for a preliminary injunction rested solely on the issue of prior restraint as to the initial application process for a license/permit. R. 2 and 3, Plaintiffs' Motion for a Preliminary Injunction, Appx. at 123 and 129.

Even assuming that issue was before this court, the safeguards enunciated by the Supreme Court in *FW/PBS*,

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[2] Carousel Amusement Center Inc. has not applied for a license, and is not an appellant herein.

Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) do not apply to license revocations because a revocation is not a prior restraint. It is not the restraint of expressive conduct[3] before it occurs. Revocation is the remedy for behavior which violates the ordinance after it has occurred. Therefore, even assuming license revocations affect speech, prior restraint analysis would not be appropriate because the remedy of revocation is implemented after the activity, not prior to it.

Further, licensees do not face the specter of losing their license because they have engaged in expressive conduct. Because license revocations do not involve the prior restraint of speech, the constitutional standard to be applied to license revocations is that enunciated by the Supreme Court in *Arcara v. Cloud Books*, Inc., 478 U.S. 697, 706, 106 S.Ct. 3172, 3177-78, 92 L.Ed.2d 568 (1986). (The Court did not advocate any special or increased standard of review for ordinances which punish conduct after the conduct has occurred.) *Also see, O'Connor v. City and County of Denver*, 894 F.2d 1210, 1216-19 (10th Cir. 1990), reh. den. March 12, 1990 (Relying on *Arcara*, the Tenth Circuit held that closing an adult entertainment business for criminal activity does not involve the First Amendment, and that the *FW/PBS Inc.* protections only apply when the government regulates content).

It is the alleged lack of procedural safeguards (prompt judicial review and its scope) which is the sum and substance of this appeal from the district court's dissolution of the injunction. Therefore, this appeal on behalf of the

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[3] For purposes of this brief only, defendants will assume plaintiffs' conduct constitutes expression.

corporate plaintiffs', whose business entities now hold licenses, must fail for lack of standing. Only the plaintiff entertainers (Dawn Pierce and Elizabeth Martz) have standing to challenge the constitutionality of the procedure under which they would be granted permits.

II. The Entertainers' Appeal From the Dissolution of the First Preliminary Injunction Is Not Yet Ripe.

The requirement of ripeness arose out of the concept of justicability based on Article III of the United States Constitution. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C.Cir.1982) (Bork, J., concurring), *cert. denied*, 464 U.S. 823, 104 S.Ct. 91, 78 L.Ed.2d 98 (1983). Ripeness requires that the "injury in fact be certainly impending." *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996) (citations omitted). Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01, 103 S.Ct. 1713, 1720-21, 75 L.Ed.2d 752 (1983).

Within the context of the First Amendment, the Supreme Court has enunciated concerns that justify a lessening of the usual requirements for a pre-enforcement challenge to a statute with criminal penalties. *Secretary of*

State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956, 104 S.Ct. 2839, 2846-47, 81 L.Ed.2d 786 (1984). The harm alleged in First Amendment cases is the "chilling effect" on the constitutionally protected right to free expression, which, the Supreme Court has stated, is "of transcendent value to all society." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965). A statute prohibiting activity protected by the First Amendment leads to "self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988); *Dombrowski*, 380 U.S. at 486-87, 85 S.Ct. at 1120-22 (the practical value of the First Amendment right may be destroyed if not vindicated before trial). The ripeness inquiry to pre-enforcement challenges in First Amendment cases usually focuses on how imminent the threat of prosecution is and whether the alleged chill on First Amendment rights is concrete and credible, and not merely "imaginary or speculative". *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1289, 1215, 39 L.Ed.2d 505 (1974). Parties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to "'chill' the exercise of free speech and expression," a constitutionally protected right. *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir.1995) (citations omitted).

On January 26, 1999 Judge Trauger entered an agreed order under which the defendants agreed that entertainers had five days from the date of entry of the trial court's ruling on plaintiffs' motion for a second preliminary injunction, among other things, in which to apply

for a permit.[4] R. 115, Agreed Order, Appx. at 292. Plaintiffs' motion for a second preliminary injunction was heard by Judge Higgins on April 13-15, 1999, as a full-blown evidentiary hearing. As of the date of this filing Judge Higgins has not issued a ruling on plaintiffs motion for a second preliminary injunction. Therefore, the entertainers do not face enforcement of the ordinance and the dissolution of the first preliminary injunction does not affect them. Any alleged harm or chill on the expression of the entertainer plaintiffs is not imminent because of the Agreed Order. Since any alleged harm is not imminent, this appeal is not ripe as to the plaintiff entertainers, Dawn Pierce and Elizabeth Martz.

In addition, the plaintiff entertainers both allege that they are currently entertainers in Nashville who engage in sexually oriented entertainment. R. 1, Déjà vu Complaint para. 10-11, Appx. at 22. Assuming the trial court were to deny the plaintiffs' second motion for a preliminary injunction in its entirety and the ordinance would then be enforced against entertainers, current entertainers are permitted to continue entertaining, even if their application for a permit is denied, until such denial of a permit is upheld by a court.

> For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court

[4] Plaintiffs' motion for a second preliminary injunction raises a vast array of challenges to the ordinance. In contrast, the instant appeal arises from the dissolution of plaintiffs' first preliminary injunction, which was grounded solely on the issue of prompt judicial review.

> after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

Nashville, Tenn., Metropolitan Code § 6.54.070(D) (3) 1999. The plaintiff entertainers do not suffer the threat of imminent harm in the event the ordinance is enforced and their applications are denied. It is in the interest of judicial economy to await the decision of the trial court on plaintiffs' motion for a second preliminary injunction. If and when Judge Higgins' ruling on that motion is appealed, then it makes sense for this Court to hear both matters together instead of these piecemeal appeals.

III. The Ordinance Fulfills the Requirements of *FW/PBS*.

A. Judicial Review Under the Common Law Writ of Certiorari Is Prompt.

The Supreme Court enunciated the following standards for reviewing a licensing/permitting code:

> In *Freedman [v. State of Maryland*, 85 S.Ct. 734, 380 U.S. 51, 13 L.Ed.2d 649 (1965)], we determined that the following three procedural safeguards were necessary to ensure expeditious decision-making by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief

> period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman, supra*, at 58-60, 85 S.Ct., at 738-740. Although we struck the licensing provision in *Riley v. National Federation of Blind of N.C., Inc., supra*, on the ground that it did not provide adequate procedural safeguards, we did not address the proper scope of procedural safeguards with respect to a licensing scheme. Because the licensing scheme at issue in these cases does not present the grave "dangers of a censorship system," *Freedman, supra*, at 58, 85 S.Ct., at 738-39, we conclude that the full procedural protections set forth in *Freedman* are not required.

FW/PBS Inc., 493 U.S. at 227-28, 110 S.Ct, at 606 citing *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988). The Court went on to say,

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of

> prompt judicial review in the event that the license is erroneously denied.

Id. at 228, 110 S.Ct. at 606.

1. Writs of Certiorari.

Article VI, Section 10 of the Tennessee Constitution provides that:

> The Judges or Justices of the Inferior Courts of Law and Equity shall have the power in all civil cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Tenn. Const., art. VI, §10. Certiorari at common law performed the function of review and supervision of the proceedings of inferior boards and tribunals by a superior tribunal, not taking the place of appeal or writ of error, but bringing up the entire record in order to make a determination whether there has been an absence or excess of jurisdiction, or a failure to proceed according to the essential requirements of the law. *Conners v. City of Knoxville*, 136 Tenn. 428, 432, 189 S.W. 870, 871 (Tenn. 1916). In Tennessee, common law writs of certiorari are authorized by Tenn. Code Ann. § 27-8-101:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not

> apply to actions governed by the Tennessee Rules of Appellate Procedure.

Tenn. Code Ann. §27-8-101 (Supp. 1998)

Plaintiffs argue that the words "or is acting illegally" are superfluous by arguing that they have the exact same meaning as "has exceeded the jurisdiction conferred". Appellant's Brief at 29. A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980). The court should assume that the legislative body used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose. *Anderson Fish & Oyster Co. v. Olds*, 197 Tenn. 604, 277 S.W.2d 344 (1955). *See also Crowe v. Ferguson*, 814 S.W.2d 721, 723 (Tenn. 1991) (To respond to the issue of whether the Tennessee Code prohibits persons who are unsuccessful candidates in a party primary from subsequently running in a non-partisan general election for a different office, the court looked to the rules of statutory construction.) The fact that the Tennessee Legislature put in both clauses, "exceeded the jurisdiction conferred, or is acting illegally", necessitates the conclusion that each clause has a meaning.

Plaintiffs try to distinguish *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978). Appellant's Brief at 19. However, the line of cases leading up to *Johnson* both define "illegal" and create an additional protection above and beyond the statutory authority of the courts to grant

the writ for "illegal action". According to *Johnson*, Tennessee courts will grant a writ if there is a procedural error or an error of law. *See State v. Odom*, 200 Tenn. 231, 292 S.W.2d 23 (1956). Based on the long line of cases discussing the concept of illegality and illegal action, *Johnson* held that the following additional circumstances warrant review under a common-law writ of certiorari:

1. Where the ruling of the inferior tribunal represents a fundamental illegality;

2. Where the ruling constitutes a failure to proceed according to the essential requirements of the law;

3. Where the ruling is tantamount to the denial to either party of a day in court;

4. Where the action of the judge was without legal authority;

5. Where the action of the judge constituted a plain and palpable abuse of discretion;

6. Where either party has lost a right or interest that may never be recaptured.

569 S.W.2d at 815 (citations omitted).

In *Johnson*, the Tennessee Supreme Court closely examined common law writs of certiorari including the writ's history and use in Tennessee. The court stated that the general rule in granting a writ is to "ascertain the validity of proceedings before a court of justice, either on the charge of their invalidity, because the essential forms of the law have not been observed, or on that of the want of jurisdiction in the court entertaining them." *Id.* at 812 (citing *State ex rel. McMorrow v. Hunt*, 137 Tenn. 243, 250, 192 S.W. 931, 933 (1917) (County clerk was suspended

from office by the Chancery Court and appealed by writ of certiorari to the Tennessee Supreme Court)).

The court then went on to say the courts of Tennessee have not hesitated to make exceptions to the general rule, one of which is the "fundamental illegality rule" exception. *Id.* The *Johnson* court lists numerous cases where the fundamental illegality exception was involved. Specifically *Johnson* discusses *State v. Odom*, 200 Tenn. 231, 292 S.W.2d 23 (1956), in which the trial judge reduced a jury conviction from first degree murder to murder in the second degree, overruled the state's motion for a new trial and denied the state's prayer for an appeal. The state petitioned for the common law writ. In *Odom*, the trial judge had not "exceeded the jurisdiction conferred" and was not "acting 'illegally' in the usual sense of the word." *Johnson*, 569 S.W.2d at 812-13. The trial judge "merely committed a procedural error, an error of law." *Id.* at 813. Nevertheless the court granted the writ, holding "this action in reducing the degree of unlawful homicide from that found by the jury is Illegal." *Id.* (citing 200 Tenn. at 235, 292 S.W.2d at 25).

In *Taylor v. Continental Tennessee Lines, Inc.*, 204 Tenn. 556, 560, 322 S.W.2d 425, 427 (1959), the court granted the common law writ, holding that the refusal of the trial judge to permit the filing of a plea in abatement "was contrary to law and in legal effect amounted to a denial to the defendants of their day in court." 204 Tenn. at 560, 322 S.W.2d at 426.

Most importantly in *Whitwell v. State*, 520 S.W.2d 338 (Tenn. 1975), the Tennessee Supreme Court granted a common law writ, relying upon the "fundamental illegality" rule in order to bar a second trial in violation of the

defendant's constitutional protection against double jeopardy. *Johnson*, 569 S.W.2d at 812-13. In *Whitwell*, the trial court was not acting "illegally" nor was it acting in "excess of its jurisdiction." *Id.* at 813. "The court had ruled erroneously on a matter of law. It is just that simple." *Id.* Had Whitwell been convicted as a result of a second trial, he would have had a right to appeal; but, absent the court's grant of the common law writ, Whitwell had "no full, complete and adequate remedy". *Id.*

The Tennessee Court of Appeals said precisely this in *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn.App. 1994) Perm. Appeal Den. saying: "If the agency or board has reached its decision in a constitutional or lawful manner, then the decision would not be subject to judicial review." *Id.* at 873.

The Supreme Court of Tennessee has consistently held that unconstitutional action by a lower tribunal constitutes grounds to issue a petition for a writ of certiorari. *State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978); *Whitwell v. State*, 520 S.W.2d 338 (Tenn.1975).

Plaintiffs suggest that the pleadings requirements of the petition for the writ is another reason why writs of certiorari do not satisfy the requirements of *FW/PBS, Inc.* The writ of certiorari process merely avoids the necessity for the respondent to move to dismiss the petition for failure to state a claim upon which relief can be granted under the writ. In a writ of certiorari proceeding, the court engages in the motion to dismiss process *sua sponte.* For example, in *Jasper Engine & Transmission Exch. v. Mills*, 911 S.W.2d 719 (Tenn. App. 1995) the petition merely recited a history of the case, the amount sued for, and the amount of the judgment entered by the trial court, and

asserted as grounds for certiorari a conclusory statement that "mutual mistakes have been made". *Id.* at 719. This was found to be insufficient to warrant issuance of a writ of certiorari. *Also see, GMAC v. Dennis*, 675 S.W.2d 489 (Tenn. Ct. App. 1984). (Neglect on the part of the petitioner is not a ground to grant a request for a writ of certiorari); *League Central Credit Union v. Mottern*, 660 S.W.2d 787 (Tenn. Ct. App. 1983) (The petitioner must be able to demonstrate that he, she or it is adversely affected by the decision of the inferior tribunal in order to be classified as an aggrieved person and therefore entitled to judicial review). The petition for a writ must be properly pled.

2. The Amendment to Tenn. Code Ann. § 27-9-111 Provides for a Decision On The Merits Within Forty (40) Days of the Writ of Certiorari Being Granted.

Tennessee Code Annotated § 27-9-111 addresses the briefing and hearing schedule used in processing a writ of certiorari. It is this section which has been amended by adding the following:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code

> Annotated, Section 27-9-109 within seven (7) days of the grant of the writ of certiorari.

Tenn. Code Ann. § 27-9-111 (Supp. 1998). In its Memorandum Opinion, the Court found that the prior version of Tenn. Code Ann. § 27-9-111 did not require the chancellor to issue an opinion within any mandated period of time. R. 22 and 23, Memorandum and Order, Appx. at 228 and 246. Tennessee Code § 27-9-111, as amended, now provides that all First Amendment cases will be heard and decided within forty (40) days from the grant of certiorari.

This time limit satisfies the requirements of *FW/PBS Inc.* and *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) reh. den., reh. en banc den.

In *East Brooks Books, Inc.*, the Sixth Circuit stated: "Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible." 48 F.3d at 225. *See, e.g. Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 562, 95 S. Ct. 1239, 1248, 43 L. Ed. 2d 448. (1975) (a delay of more than five months was excessive).

The one case which discussed a specific number of days to provide judicial review is *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) rehrg. den. 403 U.S. 924 (1971). Mr. Milton Luros returned to the United States from Europe with 37 photographs. A customs agent, acting pursuant to the Tariff Act of 1930, 19 U.S.C.A. § 1305(a), seized the photographs as obscene material. 402 U.S. at 365-66, 91 S.Ct. at 1402-03. The Supreme Court analyzed *Thirty-Seven Photographs* under *Freedman*. 402 U.S. at 367, 91 S.Ct. at 1403 citing 380 U.S. 51, 58. *Thirty-Seven Photographs* was scrutinized under the more burdensome

Freedman test, as opposed to the test utilized in *FW/PBS, Inc.* and the other sexually oriented businesses licensing cases, since *Thirty-Seven Photographs* was not content neutral review, but clearly censorship. Though the federal statute stated that prompt judicial review was available, it did not set out a time limit in which that review had to occur. 402 U.S. at 368, 91 S. Ct. at 1404. The Court examined other cases and determined that sixty (60) days for the completion of judicial proceedings was sufficiently prompt to satisfy the demand of prompt judicial review and imposed it upon the statute. *Thirty-Seven (37) Photographs*, 402 U.S. at 374-75, 91 S. Ct. at 1407.

> [N]o undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court. 402 U.S. at 373-74, 91 S. Ct. at 1407.

B. Chapter 6.54, as Amended, Ensures the Grant of a License or Permit In the Event the Court Fails To Adjudicate The Matter Promptly.

Plaintiffs argue that there is no statutory requirement that a petition for a writ be granted or denied in a specific time period. The defendants do not merely rely on the

regular practice of the Chancery Courts of Davidson County to grant petitions for a writ in two (2) days or less. The defendants rely on the provisions of the ordinance at issue which provides that a license/permit will issue in forty (40) days if the court fails to rule. Nashville, Tenn., Metropolitan Code §6.54.040(E)(3) 1999.

> [I]f the court fails to rule within forty (40) days of the filing of an appeal,, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with 6.54.150(A)(10).

Even without the recent amendments to T.C.A § 27-9-111, on its face, Chapter 6.54 satisfies the requirement of prompt judicial review.

C. The Scope of Review Under A Common Law Writ of Certiorari Is Constitutionally Sufficient.

The common-law writ of certiorari is issued by a court so that it can inspect the proceedings of an inferior tribunal to determine whether it exceeded its jurisdiction or acted illegally. *Hoover Motor Express Co., Inc. v. Railroad and Public Utilities Commission*, 195 Tenn. 593, 261 S.W.2d 233 (Tenn. 1953). The court must review the evidence submitted to the inferior tribunal and determine by a preponderance of the evidence whether the inferior tribunal exceeded its jurisdiction or acted in an illegal, arbitrary or capricious manner. *Id.* at 235. In addition, a decision of an inferior tribunal that is not supported by material evidence is arbitrary and, thus, void. *Id.* at 238. Therefore, the trial court must review the record of the

inferior tribunal to determine if there is "*any* evidence of a material or substantial nature from which that body, by *reasoning from that evidence*, arrived at the conclusion of fact which is being reviewed." *Massey v. Shelby County Retirement Bd.*, 813 S.W.2d 462, 465 (Tenn. Ct. App. 1991) (emphasis in the original). *See also Houston v. Memphis and Shelby County Board of Adjustment*, 488 S.W.2d 387, 389 (Tenn. Ct. App. 1972) (the court granted variance appealed by nearby landowners through a writ of certiorari holding that there was no material evidence before the board demonstrating the applicant fulfilled the requirements to obtain a variance and therefore the decision was outside the board's jurisdiction); *Davison v. Carr*, 659 S.W.2d 361, 363-64 (Tenn. 1983) (City commissioner was removed and filed petition of certiorari in circuit court seeking review. The court held that: (1) the commissioner properly challenged board's action by way of petition of certiorari; (2) as common-law writ of certiorari properly issued, material evidence rule was applicable; and (3) there was no material evidence to support judgment of board of commissioners in removing commissioner from office).

Material evidence is such evidence that is "material to the question in controversy, which must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, be determinative of the case." *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 331, 89 S.W. 319, 321 (Tenn.1905); *Fuller v. Tennessee-Carolina Transportation Co.*, 63 Tenn. App. 330, 338, 471 S.W.2d 953, 956 (Tenn. Ct. App. 1970) (The court looked to the definition of "material evidence" to determine whether or not a directed verdict was appropriate.) Substantial evidence has been defined as such evidence as reasonable

minds might accept as adequate to support the conclusion of the inferior tribunal. *Rice Bottling Co. v. Humphries*, 213 Tenn. 8, 10, 372 S.W.2d 170, 172 (Tenn. 1963).

Additional evidence is limited to the question of whether the board or commission being reviewed exceeded its jurisdiction or acted fraudulently, arbitrarily, or illegally. *Hoover*, 261 S.W.3d 233, 238; *Hemontolor v. Wilson County Board of Zoning Appeals*, 883 S.W.2d 613, 618-19 (Tenn. Ct. App. 1994) (Trial court correctly excluded introduction of additional evidence that did not pertain to the question of whether the Board exceeded its jurisdiction or acted illegally, arbitrarily or capriciously.) The rules governing the admission of additional evidence under the common-law writ of certiorari have been summarized as follows:

> In summary, under the common-law writ of certiorari the court reviews only the essential legality of the administrative proceeding and conclusions of law or mixed conclusions of law and fact reached by the administrative agency. New evidence is admissible only on the issue of whether the administrative body exceeded its jurisdiction, or acted illegally, capriciously or arbitrarily. Agency conclusions of fact are accepted if there is material evidence in the agency record to support its conclusions. On this issue, there is no new evidence admitted and no re-weighing of the facts. The reviewing court is limited to vacating the finding and remanding the cause to the agency for the purpose of making a legally supportable finding of fact.

Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 Mem. St. U. L. Rev. 19 (1973).

Judge Nixon, in ruling on defendants' motion to dissolve the preliminary injunction found *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, (Tenn. Ct. App. 1996) convincing authority for the proposition that Tennessee courts treat allegations of unconstitutional administrative agency actions as reviewable under a writ of certiorari. In *Hoover Inc.*, the Board of Zoning Appeals denied Hoover Inc. a conditional use permit to operate a quarry. *Id.* at 902. The Tennessee Court of Appeals stated that "[a]n illegal, arbitrary, or fraudulent action could be any number of things. Examples include the following:

1. the failure 'to follow minimum standards of due process';
2. the misrepresentation or misapplication of a legal standard;
3. the making of a decision for 'ulterior motives'; or
4. the violation of a constitutional standard."

Hoover, 924 S.W.2d at 905, citing Cantrell, *supra* at 28-29. The court also held that the issue of whether an administrative body has acted illegally, arbitrarily or fraudulently is not limited to a determination of whether material evidence supported the administrative body's decision. *Hoover Inc.*, at 905. Clearly, Judge Nixon properly relied upon *Hoover* in holding that certiorari review in Tennessee complies with the constitutional requirement of prompt judicial review.

Plaintiffs attempt to rely on the language in *Freedman* for the proposition that the scope of review of the courts under a common law writ of certiorari is insufficient in the context of prompt judicial review. Appellant's Brief,

at 33-35. Plaintiffs' argument is unpersuasive for two reasons: 1) *Freedman* did not discuss the scope of review; and 2) the court in *Freedman* was discussing the burden of the government to bring the matter to the courts and the finality of the determination of the administrative decisionmaker. What the *Freedman* Court said was:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc. v. Sullivan*, [372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)]; *A Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Marcus v. Search Warrant*, [367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)]; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519, 82 S.Ct. 1432, 1453-1454, 8 L.Ed.2d 639 (1962). To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.

Freedman, 380 U.S. at 58-9, 85 S.Ct. at 739. A certiorari proceeding is adversarial.

The plaintiffs also erroneously rely on *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) and *Baby Tam & Co., Inc. v. Las*

Vegas, 154 F.3d 1097 (9th Cir. 1998). *Conrad*, like *Freedman*, was a censorship case and it did not involve a licensing ordinance. In *Conrad*, the board for the municipal auditorium in Chattanooga refused to allow Southeastern Promotions to bring a touring company performing the musical "Hair" to the city's municipal auditorium because the board decided, without ever seeing a performance of "Hair", that the production was not clean or healthful and would not be in the best interest of the community. *Conrad*, 420 U.S. at 48, 95 S.Ct. at 1242. The Court rightly reviewed this decision under the *Freedman* test as it clearly involved censorship. The Court never discussed the scope of review which would be appropriate under the *Freedman* test. The city's refusal to permit the production of "Hair" was found to be unconstitutional because it failed to provide for prompt judicial review, and the fact that at the hearing for the temporary injunction the burden of proof rested on Southeastern Promotions. *Conrad*, 420 U.S. at 561-62, 95 S.Ct. at 1248.

Baby Tam actually supports the position of the defendants, that the scope of review is sufficient. In *Baby Tam* the City of Las Vegas' ordinance was enjoined because it contained "no provision that a judicial hearing must be held or a decision must be rendered within a prescribed period of time." 154 F.3d at 1101. However, the Ninth Circuit went on to define the term "judicial review" saying, "The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless." *Id.* at 1101-02. There is no question that these two elements are present in a writ of certiorari proceeding in Tennessee. *See* Tenn. Code Ann. § 27-9-111.

Defendants have not found any case that has held that the scope of review provided by Tennessee's common law writ of certiorari does not provide the petitioners the process they would be due under the First and Fourteenth Amendments to the United States Constitution. The cases cited by the plaintiffs do not address the scope of review of a court when reviewing an administrative decision, but instead discuss the procedural requirements of the review.

Smith v. County of Los Angeles, 259 Cal.Rptr. 231, 211 Cal.App.3d 188 (Cal. Ct. App. 1989) is instructive. The plaintiff, Smith, was denied a conditional use permit for an adult cabaret. *Id.* at 232, 211 Cal.App.3d at 190. Smith appealed the Board of Supervisors' denial of his request for a conditional use permit. *Id.* The trial court denied Smith's petition for a writ of mandate to set aside the Board of Supervisors' denial, holding that the board's action was based upon substantial evidence. *Id.* at 232, 211 Cal.App.3d at 190-91. The board heard testimony, visited the site, and reviewed many letters from the community. The board found that the use would contribute to urban blight and diminish property values in the area. *Id.* at 235, 211 Cal.App.3d at 195.

Smith appealed to the trial court and then to the appellate court. Smith's argument to the appellate court was that the trial court should have exercised its independent judgment in reviewing the evidence since the matter "touches upon fundamental and vested rights to continue a constitutionally protected business." *Id.* at 236, 211 Cal.App.3d at 196-97 (citations omitted). The grant or denial of a conditional use permit by the board is an administrative or quasi-judicial act. *Id.* at 237, 211 Cal.App.3d at 198. Therefore, the petitioner must proceed using an administrative mandamus which only requires

the court to look to the administrative record to ascertain whether the agency has proceeded without or in excess of its jurisdiction, whether there was a fair hearing, or whether there was any prejudicial abuse of discretion. *Id.* The court's review is limited to a review of the record to determine whether the findings of the board support the decision, and whether the evidence in the record supports the findings, commonly referred to as the substantial evidence test. *Id.* The court may not consider evidence outside the administrative record and must deny the writ if there is any substantial evidence in the record to support the findings. *Id.* The appellate court found that the standard of review by the trial court was appropriate and sufficient[5]. *Id.* at 240, 211 Cal.App.3d at 200.

This limited scope of review is appropriate in the case at bar because of the extremely limited discretion of the Board. The Board must grant the applicant a license/permit if the applicant is at least eighteen years of age, has not been convicted of any crimes of a sexual nature, not included false information on the application[6] or had a similar license/permit revoked in the last year. Businesses cannot have been found to have violated the adult entertainment zoning code in the last year and if the business has booths, their construction must conform to the requirements in the ordinance. This is fact-finding within very limited parameters.

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[5] The appellate court based its decision on its belief that the constitutional right involved was a vested property right not a first amendment right. However, Smith's claim to have a "constitutionally protected business" seems to allude to more than just a vested property interest. *Id.* at 236, 211 Cal.App.3d at 196-97

[6] This requirement is limited to information the applicant knew or should have known was false at the time of the application.

In *Gasparo v. New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998), the court reviewed a concession scheme for newspaper stands which was replacing the city's licensing ordinance. The plaintiffs challenged the concession ordinance claiming, among other things, that the ordinance was unconstitutional under the First Amendment because it did not require a "prompt" decision on a permit application and that the procedures for judicial review were insufficient when the agency has denied a permit application. *Id.* at 210. In response the city argued that sufficient judicial review is provided by the availability of a proceeding pursuant to Article 78 of New York's Civil Procedure Law. *Id.* at 211.

An Article 78 proceeding is a form of action providing relief that was previously obtained by writs of certiorari, mandamus, and prohibition. *Id.* The court found that the Article 78 proceeding was virtually identical to the Illinois scheme which was reviewed by the Seventh Circuit in *Graff v. City of Chicago*, 9 F.3d 1309, (7th Cir. 1993). Under Illinois law, "[t]he appropriate method to review Chicago's administrative agency decisions is by the common law writ of certiorari." *Gasparo*, 16 F.Supp.2d at 211 citing *Graff*, 9 F.3d at 1325.

The *Gasparo* court found the concurring opinion of Judge Flaum in *Graff* convincing. *Id.* at 211. Judge Flaum reasoned that the *Freedman* procedural safeguards are only necessary when the board/administrator is making content-based decisions. *Id.* However, when the board is not making content-based decisions the *Freedman* procedural safeguards are unnecessary.

> Judge Flaum reasoned that extraordinary provisions for judicial review were mandated only where an administrator was exercising discretion

> to make content-based judgments about whether expressive materials were protected by the First Amendment. Where these kinds of content-based judgments are made, he wrote, "we wisely do not trust to administrative officials [such discretion] without the benefit of a watchful judicial eye." *Graff*, 9 F.3d at 1333 (Flaum, J., concurring). Judge Flaum explained, however, that extraordinary judicial review procedures were not needed when an administrator's job is merely "to make the kind of determinations for which they are especially suited; e.g. questions about city aesthetics, traffic flow or City Code violations." *Id.* Having decided that the permitting scheme in *Graff* entailed the evaluation of non-content-based criteria. Judge Flaum concluded that the ordinary procedures for judicial review were sufficient to satisfy the constitutional requirements. Judge Ripple also concurred for substantially the same reasons. See *id.* at 1335 (Ripple, J., concurring).

Gasparo, 16 F.Supp.2d at 212.

The court went on to say that under Chicago's scheme, the administrator's discretion is limited by objective criteria. *Id.* 212-13. Therefore, government officials are not engaging in the kind of content-based judgments about expressive material that were contemplated in *Freedman's* review of a movie censorship scheme[7]. *Id.* The court concluded that though licensing schemes that have the effect of imposing a prior restraint on speech must contain

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[7] The court also distinguished the Chicago concession scheme from administering an "adult establishment" ordinance. *Id.* at 213. Since the decisions made by the Board are strictly factual, not content-based, *Gasparo* remains persuasive authority on this issue.

standards to guide the licensor's discretion and must include time limits to ensure that a decision is made promptly, the requirement that the ordinance provide an explic.t mechanism for judicial review may not, for the reasons outlined by Judge Flaum in *Graff*, always be necessary. *Gasparo*, 16 F.Supp.2d at 212-13. "Specifically, such special provisions may not be necessary where, as here, an ordinance is content-neutral, the licensor's discretion is not "unfettered," the statute requires that the request for a license be acted on promptly, and the administrative determination is based on criteria that are within the administrator's normal expertise." *Id.*

This Court has, however, rejected the Seventh Circuit's analysis of the prompt judicial review requirement set forth in *Graff. East Brooks Books Inc.*, 48 F.3d at 224-25. This Circuit requires not just access to the courts, but a prompt judicial decision, in order for a local ordinance to comply with the "prompt judicial review" requirement. However, the issue regarding the sufficiency of the appropriate scope of judicial review is a completely separate issue. *Gasparo's* (and *Graff's*) analysis of the required scope of review for the types of decisions made by the Board is sound reasoning and it is persuasive. Chapter 6.54 of the Metropolitan Code contains very specific limits on the decisions made by the Board all of which are factually based decisions. The scope of the Tennessee certiorari process passes constitutional muster, for the types of factual decisions being made by the Board.

In addition, the separation of powers doctrine cautions against imposing too broad a scope of review of the fact-finding made by an administrative agency. *Hoover Motor Exp. Co.*, 261 S.W.2d at 238, 195 Tenn. at 606. *Also see, Federal Radio Com. v. Nelson Bros. Bond & Mortg. Co.*,

289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166 (1933). When an administrative agency's fact-finding is limited to content-neutral objective criteria, neither the judiciary or the legislature should require that the judiciary substitute its judgement for that of the administrative agency.

IV. Plaintiffs Have no Prospect of Irreparable Harm.

The irreparable harm claimed by plaintiffs is the burden of a prior restraint on their sexually explicit speech. Chapter 6.54, as amended, no longer presents any prior restraint as it mandates a prompt administrative determination and that the status quo be maintained pending judicial review. Tenn. Code Ann. § 27-9-111 has been amended to provide for a judicial determination to be made within forty (40) days of the issuance of the writ of certiorari. Thus, plaintiffs cannot show any danger of irreparable harm. Further, since the plaintiffs' businesses now hold licenses the specter of prior restraint has been vanquished entirely.

V. The Public Interest is Advanced by Preventing the Harmful Secondary Effects Caused by Sexually Oriented Businesses.

Plaintiffs claim that the public interest is in free expression. While there is public interest in free expression, erotic messages are not entitled to the same protection given other speech. As the Supreme Court stated in *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976):

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is

> said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Similarly, in *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998), the Sixth Circuit stated that sexually explicit speech is not as protected as other types of speech and regulations regarding sexually explicit speech are not subject to strict scrutiny. The public's interest also lies in having the government protect its citizens from crime, disease, and urban blight, and in seeing that the laws designed to protect the public are enforced.

CONCLUSION

Upon the granting of sexually oriented business licenses to the corporate plaintiffs' businesses in this case, they lost their standing to challenge the procedure for obtaining a license as set out in the challenged ordinance. The entertainers application for review of the dissolution of the injunction by the trial court, is not yet ripe for adjudication because the Metropolitan Government is currently constrained by an agreed order from enforcing the ordinance against the entertainers until such time as the trial court rules on plaintiffs' second motion for a preliminary injunction. Chapter 6.54 of the Metropolitan Code, provides for prompt judicial review by issuing a license within forty (40) days of the filing of an appeal. The scope of review offered under a writ of certiorari is constitutionally sufficient. Plaintiffs cannot show that they are likely to succeed on the merits of their complaint or that

they will suffer irreparable harm in the absence of an injunction, and therefore the District Court's order dissolving the injunction should be upheld by this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the accompanying brief complies with the type-volume limitation as set forth in Fed. R. App. P. Rule 32(a)(7)(B)(i), in that the number of words in the brief is 8,506.

DATED: July 21, 1999

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 21st day of July 1999.

/s/ Shayna Abrams
Shayna Abrams

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	Case No. 3-97-1066 Judge Nixon Magistrate Griffin
JERRY C. PENDERGRASS, ET AL. Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.	Consolidated Cases No. 3-97-1176 Judge Nixon Magistrate Judge Griffin

MEMORANDUM OF LAW

(Filed Jul. 21, 1998)

The defendants file this memorandum of law in support of their Motion to Dissolve the Preliminary Injunction. This Court identified two (2) reasons in its Memorandum for enjoining Metropolitan Government from enforcing its Sexually Orientated Business Ordinance: 1) Metropolitan Code Chapter 6.54 (hereinafter

"Chapter 6.54") did not sufficiently preserve the status quo; and 2) Chapter 6.54 did not provide for sufficiently prompt judicial review. Memorandum Opinion (Docket No. 22).

The Metropolitan Council amended Chapter 6.54 to correct the deficiencies noted in this Court's Memorandum Opinion by:

1. providing for maintenance of the status quo if there is a denial of an application, a denial of an application to renew, or a decision to revoke or suspend a license or permit; and

2. providing for prompt judicial review in the event of an adverse administrative decision.

In addition, the Metropolitan Council made three other amendments to Chapter 6.54: 1) shortening the administrative time limit for an administrative decision from eighty-four (84) days to a total of forty-seven (47) days; 2) treating any failure by any department to complete its investigation/inspection report within the time limit required as approval of the application by that department; and 3) providing that any failure on the part of the Sexually Oriented Business Licensing and Permitting Board ("Board") to have a quorum would result in the issuance of a license. The amendments were passed on third and final reading on February 3, 1998. A copy of amended Chapter 6.54 is attached as Exhibit A[1] to this motion.

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[1] The Council also provided that the ordinance would go into effect on March 1, 1998, but existing businesses are given until June 30, 1998, to submit an application. Existing entertainers must submit an application by April 15, 1998. Existing businesses were given a 120 day

(Continued on following page)

The Tennessee State Legislature also amended T.C.A. § 27-9-111 to correct its deficiencies. The amendment to the State's writ of certiorari statute now ensures prompt judicial review by providing that in cases involving First Amendment rights, a determination on the merits of an applicant's appeal of an adverse administrative decision will occur within forty (40) days of the court granting the writ of certiorari. A certified copy of the amendments to T.C.A. § 27-9-111 is attached as Exhibit B to this motion.

The Metropolitan Government respectfully submits that any deficiencies in Chapter 6.54 of the Metropolitan Code or T.C.A. § 27-9-111 have been corrected. The defendants respectfully request the Court to dissolve the preliminary injunction.

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A preliminary injunction can be modified or dissolved. In order to determine whether a preliminary injunction or a temporary restraining order should be dissolved a court must consider: "(1) the likelihood of success on the merits, (2) whether irreparable injury will result without the injunction, (3) the probability of substantial harm to others, and (4) whether the public interest is advanced by the injunction." *International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. denied*, 504 U.S. 973, 112 S. Ct. 2941, 119 L. Ed. 2d 565

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grace period to come into compliance and existing entertainers were given a 45-day grace period to come into compliance.

(1992). It is also generally held that "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

A. The Administrative Determination Is Prompt

Any sexually oriented business or any entertainer seeking to work in such a business must obtain a license or a permit.[2] Once an application for a license is submitted by a sexually oriented business, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business and report the results of their inspections to the Board. Metropolitan Code Sec. 6.54.040(B)(1). The application is also sent to the Police Department so that a criminal background check may be run on the applicant. *Id.* The background check is necessary to ensure that no applicant has recently been convicted of a crime of a sexual nature.[3] The results from the inspections and the investigative reports are

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[2] The following persons must obtain a license: any partner of a partnership who will participate in the day-to-day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant who will participate in the day-to-day operation of the business. § 6.54.040(A)(4). A person desiring to be an entertainer in a sexually oriented business must obtain a permit. § 6.54.060(A).

[3] As discussed in detail *infra*, a conviction for a misdemeanor violation makes the applicant ineligible to receive a license for two years from the date of the conviction. For felony convictions, the period is five years. Chapter 6.54.050(B)(2)(a) and (b), 6.54.080(A)(2)(a) and (b). The constitutionality of these provisions was discussed in the Defendant's Brief in Opposition to Plaintiff's Motion for a Temporary Restraining Order, pp. 5-7.

given to the Board within twenty (20) days of the filing of the application. Metropolitan Code Sec. 6.54.040(B)(1). Any failure of a department to perform its investigation and provide the required information within the required time to the Board shall be treated as though that department approved the application. *Id.*

Once the Board has received the reports from the departments, it must meet and grant or deny the application within fifteen (15) days. Metropolitan Code Sec. 6.54.040(C)(1). Further, if the Board does not meet or it meets but does not have a quorum, the license is "deemed approved" and mailed to the applicant. *Id.* If the Board meets on the last of the fifteen days permitted under the ordinance, and allowing one day to mail a denial, the administrative process will be completed in forty-seven (47) days.

If the Board denies an application, the applicant may either appeal to the Board for a full hearing or proceed immediately to court. Metropolitan Code Sec. 6.54.040(E)(1)-(2). Should the applicant decide to appeal to the Board, the applicant has five (5) days to appeal and the Board has fifteen (15) days in which it must meet and hear the appeal. Metropolitan Code Sec. 6.54.040(E)(1)(a)-(b). Allowing one (1) day for the Board to mail its written decision (an oral decision will be rendered at the hearing, Metropolitan Code Sec. 6.54.040(E)(1)(d)), the applicant, at his/her option, may add an additional twenty-one (21) days to the administrative process. The same time limits and restrictions on the departments and the Board apply to permit applications for individual entertainers. Metropolitan Code Sec. 6.54.070(D).

B. The Status Quo Is Maintained Pending Judicial Review

The amended ordinance allows currently operating applicants sixty (60) days to appeal an adverse administrative decision:

> For an existing sexually oriented business, as defined in 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. . . . Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review, §§ 6.54.040(E)(3). (See § 6.54.070(D)(3) for the identical provision applicable to permit applicants).

As a result of the amendments, businesses and existing entertainers may continue to operate until the court makes a judicial determination on the merits of their appeal. Metropolitan Code Sec. 6.54.040(E)(3). In the alternative, should an existing business or an existing entertainer choose to forgo an appeal to the court they may continue to operate until the time to appeal from an administrative decision has expired. *Id*; T.C.A. § 27-9-102.

C. Judicial Review Is Prompt

1. Writs of Certiorari.

Article VI, Section 10 of the Tennessee Constitution provides that:

> The Judges or Justices of the Inferior Courts of Law and Equity, shall have the power in all civil

> cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Certiorari at common law performed the function of review and supervision of the proceedings of inferior boards, tribunals by a superior tribunal, not taking the place of appeal or writ of error, but bringing up the entire record in order to make a determination whether there has been an absence or excess of jurisdiction, or a failure to proceed according to the essential requirements of the law. *Conners v. City of Knoxville*, 136 Tenn. 428, 432, 189 S.W. 870, 871 (Tenn. 1916). In Tennessee, common law writs are authorized by T.C.A. § 27-8-101:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

A common-law writ is granted by a court so that it can inspect the proceedings of an inferior tribunal or board to determine whether there have been any irregularities. *Owens v. State Bd. of Architectural and Eng'g Exam'rs*, No. 89-327-11, 1990 50722 (Tenn. Ct. App., M.S. April 25, 1990), *perm. app. denied*, (Tenn. July 30, 1990) (unpublished disposition, copy attached). In *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978), the Tennessee Supreme Court held that the following additional circumstances warrant review under a common-law writ of certiorari:

1. Where the ruling of the inferior tribunal represents a fundamental illegality;
2. Where the ruling constitutes a failure to proceed according to the essential requirements of the law;
3. Where the ruling is tantamount to the denial to either party of a day in court;
4. Where the action of the judge was without legal authority;
5. Where the action of the judge constituted a plain and palpable abuse of discretion;
6. Where either party has lost a right or interest that may never be recaptured.

The court, before granting the request for issuance of a writ of certiorari, may require notice of the application to be given to the adverse party or may issue the writ without notice. T.C.A. § 27-9-108. Since a petition for a writ of certiorari may be *ex-parte*, the petition itself must contain sufficient allegations of illegality, irregularity or one of the circumstances above to demonstrate the grounds for granting the writ of certiorari. *Jasper Engine & Transmission Exch. v. Mills*, 911 S.W.2d 719 (Tenn. Ct. App. 1995).

Under Tennessee Code Annotated § 27-9-101, anyone aggrieved by any final judgement of a board may have that judgment reviewed by the courts by a writ of certiorari if a procedure for review is not otherwise specifically provided for. Not only may any party appeal an administrative decision to the courts, but any administrative decision making any material change in the status of the matter

can be held in abeyance within the discretion of the court.[4] T.C.A. § 27-9-106(a).

2. T.C.A. § 27-9-111 As Amended.

Tennessee Code Annotated § 27-9-111 addresses the briefing hearing and schedule used in processing a writ of certiorari. It is this section which has been amended by adding the following:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of *certiorari*. When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of *certiorari*.

In its Memorandum Opinion, the Court found that the prior version of T.C.A. § 27-9-111 did not require the chancellor to issue an opinion within any mandated period of time. Mem. Op. p. 12. (Docket No. 22). Tennessee Code § 27-9-111, as amended, provides that all First Amendment cases will be heard and decided within forty (40) days from the grant of certiorari.

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[4] This provision will be unnecessary in the matter at bar as the amendments to 6.54 maintain the status quo.

The District Court, in *DLS v. City of Chattanooga*, 894 F.Supp. 1140, 1148 (E.D. Tenn. 1995), found the "prompt judicial review" requirement was met by the provision in the Chattanooga ordinance that required the City Attorney for Chattanooga, within five (5) days of a final administrative action, to institute suit for a declaratory judgment in the Chancery Court of Hamilton County. Chattanooga City Code, § 11-424(d). Amended T.C.A. § 27-9-111 provides an expedited hearing in which the initial judicial review and decision shall occur within forty (40) days of the issuance of the writ of certiorari. This time limit would not only satisfy *DLS, supra* but also satisfy *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L.Ed.2d 603 (1990) and *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995) (rehearing and suggestion for rehearing *en banc* denied May 5, 1995).

In *East Brooks Books* the Sixth Circuit stated:

> Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible.

48 F.3d at 225, (citing *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 562, 95 S. Ct. 1239; 1248, 43 L. Ed. 2d (1975) (a delay of more than five months was excessive)). Though several cases discuss prompt judicial review, these cases give no indication of what specific period of time is sufficient to satisfy "prompt."

The one case which discussed a specific number of days to provide judicial review is *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). Mr. Milton Luros returned to the United States from Europe with 37 photographs. A customs

agent, acting pursuant to the Tariff Act, 19 U.S.C.A. § 1305(a), seized the photographs as obscene material. 402 U.S. at 365-66, 91 S.Ct. at 1402-03. The Supreme Court analyzed *Thirty-Seven Photographs* under *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). 402 U.S. at 367, 91 S.Ct. at 1403. *Thirty-Seven Photographs* was scrutinized under the more burdensome *Freedman* test, as opposed to the test utilized in *FW/PBS* and the other licensing cases[5], since *Thirty-Seven Photographs* was not content neutral review but clearly censorship. Though the federal statute stated that prompt judicial review was available, it did not set out a time limit in which that review had to occur. 402 U.S. at 368, 91 S. Ct. at 1407. The Court examined other cases and determined that sixty (60) days for the completion of judicial proceedings was sufficiently prompt to satisfy the demand of prompt judicial review and imposed it upon the statute. 402 U.S. at 374-75, 91 S. Ct. at 1407.

> [N]o undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to the

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[5] Since the Court found that under the *Freedman* factors sixty days for a judicial review of the seizure was "prompt," surely under the less burdensome *FW/PBS* test sixty days for judicial review must be prompt. Further, the lesser standard of *FW/PBS* may permit more than sixty days to satisfy the requirement of a "possibility of prompt judicial review.

> institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court. 402 U.S. at 373-74, 91 S. Ct. at 1407.

Under Chapter 6.54 of the Metropolitan Code, the entire period of time from application to final judicial determination on the merits will only take eighty-seven (87) days, unless the applicant, at his or her option, requests to have an administrative hearing before the Board prior to appealing to the courts. The entire initial administrative process of application, inspection and investigation, and the initial administrative determination of the board (including the additional ten (10) day extension for any necessary additional investigation) only consumes forty-seven (47) days. Metropolitan Code Sec. 6.54.040(C)(8). The judicial review must now be completed in forty (40) days under T.C.A. § 27-9-111 as amended. The entire eighty-seven (87) day administrative and judicial process is three (3) days less than the former administrative determination period previously held to meet constitutional requirements. Mem. Op. at 8-9. (Docket no. 22). Twenty-one (21) additional days may be added to the administrative determination at the applicant's option, if he or she chooses to appeal to the Board for an administrative hearing (five (5) days to appeal, fifteen (15) days for the Board to meet, one (1) day to issue the written decision). Metropolitan Code Sec. 6.54.040(E)(1).

3. Chapter 6.54 As Amended Provides For A License or Permit In The Event The Court Fails To Adjudicate The Matter Promptly.

Metropolitan Code § 6.54.040(E)(3), as amended, also strengthens prompt judicial review.

> [I]f the court fails to rule within forty (40) days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with 6.54.150(A)(10).

Metropolitan Code § 6.54.070(D)(3) has the identical provision regarding permits.

As amended, Chapter 6.54 maintains the status quo and provides for prompt judicial review. Chapter 6.54 does not permit enforcement of any adverse administrative decision until the statutory time for appeal has passed. If the applicant appeals an adverse administrative decision, the decision is stayed until there is a judicial determination on the merits. Chapter 6.54 also provides that if the reviewing court has not made a decision on the merits within forty days, the license or permit shall issue. Even without the recent amendments to T.C.A § 27-9-111, on its face, Chapter 6.54 satisfies the requirement of prompt judicial review.

The recent amendment to T.C.A. § 27-9-111 provides for a judicial decision on the merits within forty (40) days from the date the state court grants the writ of certiorari. The amendments to Chapter 6.54 and T.C.A. § 27-9-111 together eliminate the issues raised by the plaintiffs in

their motions for a preliminary injunction and address the deficiencies noted by the Court that compelled it to grant the preliminary injunction. Since the amended versions of Chapter 6.54 and T.C.A. § 27-9-111 now fulfill the requirements of *FW/PBS, Inc. v. City of Dallas*, plaintiffs cannot show a likelihood of success on the merits.

II. PLAINTIFF'S HAVE NO PROSPECT OF IRREPARABLE HARM.

The irreparable harm claimed by plaintiffs is the burden of a prior restraint on their sexually explicit speech. Chapter 6.54, as amended, no longer presents any prior restraint as it mandates a prompt administrative determination and that the status quo be maintained pending judicial review. T.C.A. § 27-9-111 has been amended to provide for a judicial determination to be made within forty (40) days of the issuance of the writ of certiorari. Thus, plaintiffs cannot show any danger of irreparable harm.

III. THE PUBLIC INTEREST IS ADVANCED BY PREVENTING THE HARMFUL SECONDARY EFFECTS CAUSED BY SEXUALLY ORIENTED BUSINESSES.

Plaintiffs claim that the public interest is in free expression. While there is public interest in free expression, erotic messages are not entitled to the same protection given other speech. As the Supreme Court stated in *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310, (1976):

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is

> said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Similarly, in *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998), the Sixth Circuit stated that sexually explicit speech is not as protected as other types of speech and regulations regarding sexually explicit speech are not subject to strict scrutiny.

The public's interest lies in having the government protect its citizens from crime, disease, and urban blight, and in seeing that the laws designed to protect the public are enforced. This is the interest that militates against this preliminary injunction.

IV. PLAINTIFFS HAVE FAILED TO COMPLY WITH FED. R. CIV. P. 65 WHICH REQUIRES THE GIVING OF SECURITY PRIOR TO THE ISSUANCE OF AN INJUNCTION.

Fed. R. Civ. P. 65(c) requires that no preliminary injunction shall issue unless the applicant shall have given security in such sum as the Court deems proper for the payment of such costs and damages as ~~may be~~ incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Plaintiffs have given no such security in the instant case. Thus, for this additional reason, the preliminary injunction should be dissolved.

CONCLUSION

The amendments to Chapter 6.54 respond to the deficiencies noted by the Court in its previously entered Memorandum. The amendments require a more prompt administrative determination, maintain an applicant's status quo during the administrative and judicial appeal processes, and provide for prompt judicial review. The recent amendments to T.C.A. § 27-9-111 ensure prompt judicial review because the court must rule within forty (40) days of the issuance of the writ of certiorari.

Defendants respectfully submit that plaintiffs are no longer entitled to an injunction against the enforcement of Chapter 6.54. Plaintiffs can no longer show that they are likely to succeed on the merits of their complaint or that they will suffer irreparable harm in the absence of an injunction, and therefore the injunction should be dissolved.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
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DAVIDSON COUNTY
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 21st day of July, 1998.

/s/ Shayna Abrams
Shayna Abrams

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	)	Case No. 3-97-1066 Judge Nixon Magistrate Griffin

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

(Filed Nov. 26, 1997)

Come the defendants, through counsel, and for their response to plaintiffs' motion for a preliminary injunction, state as follows:

STATEMENT OF FACTS

Chapter 6.54 of the Metropolitan Code of Laws was passed on third and final reading on August 19, 1997. (A copy of the ordinance, as codified, is filed as Exhibit I). Pursuant to Chapter 6.54, all sexually oriented businesses are required to obtain licenses, and all individuals desiring to be entertainers at sexually oriented businesses are required to obtain permits.

Any business or entertainer may obtain a license or a permit by application.[1] Once an application is submitted by a sexually oriented business, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business and report the results of the inspection to the Sexually Oriented Businesses Licensing and Permitting Board ("the Board"). The application is also sent to the police department so that a criminal background check may be run on the applicant. The background check is necessary to ensure that no applicant has recently been convicted of a crime of a sexual nature.[2] This report is also given to the Board.

All inspection results and reports must be completed and returned to the Board within thirty days of the filing of the application, however the Board has adopted a policy (Policy No. 80) that all inspection results and reports must be prepared and submitted to the Board within one week of the filing of the application. (A copy of the entire set of the Board's policies is filed as collective Exhibit 2).

Once the Board has received the reports from the departments, it must meet and grant or deny the application

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[1] The following persons must obtain a license: any partner of a partnership who will participate in the day-to-day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant who will participate in the day-to-day operation of the business. § 6.54.040(A)(4). A person desiring to be an entertainer in a sexually oriented business must obtain a permit. § 6.54.060(A).

[2] As discussed in detail *infra*, a conviction or plea to a misdemeanor violation makes the applicant ineligible to receive a license for two years from the date of the conviction, plea, or release from confinement. For felonies, the period is five years. Chapter 6.54.040(C)(2)(a) and (b).

within twenty days. § 6.54.040(C). As stated in sections 6.54.040(C) and 6.54.070(D), the Board has no discretion with respect to granting or denying an application. If the applicant has reached eighteen years of age, and has not been recently convicted of a crime of a sexual nature and the business complies with the applicable fire, health and zoning codes, a license **must** issue.[3] The same time limits and Board policies apply to permit applications for individual entertainers. So long as the applicant is eighteen and has not recently been convicted of a crime of a sexual nature, the Board **must** issue the permit.

Licenses and permits may only be suspended or revoked for the ten specific reasons listed in section 6.54.140. These reasons include, but are not limited to, the discovery that the applicant has made a false or misleading statement on the application, that the required fees have not been paid, that intoxicating liquor or narcotics are being sold on the premises. The Board may not suspend or revoke a license for any reason other than those listed in section 6.54.140.

ARGUMENT

A preliminary injunction is an extraordinary and drastic remedy and a plaintiff's motion for preliminary injunctive relief "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong* ___ U.S. ___, ___, 117 S.Ct. 1865, 1867, 138 L.Ed.2d 162 (1997). In order to determine

[3] The Board additionally requires that the applicant be found not to have given any false or misleading information on the application or to have omitted any material facts from the application. § 6.54.040(C)(1).

whether a motion for a preliminary injunction or a temporary restraining order should be granted, a court must consider: "(1) the likelihood of success on the merits, (2) whether irreparable injury will result without the injunction, (3) the probability of substantial harm to others, and (4) whether the public interest is advanced by the injunction." *International Resources. Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. denied*, 504 U.S. 973, 112 S.Ct. 2941, 119 L.Ed.2d 565 (1992). It is also generally held that "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re: DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Because the court must consider whether the movant will suffer irreparable harm without the order and whether the movant has a reasonable chance of ultimately prevailing on the merits, the court may consider the potential harm that the order would cause the opposing party and where the public interest lies. *Con-Way Southern Express v. Hewlett*, 758 F. Supp. 464, 465 (M.D. Tenn. 1991).

The Sixth Circuit has recognized that:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction; it is the strong arm of equity, that never ought to be exerted unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18 Intern. Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied*, 411 U.S. 967, 93 S.Ct. 2149, 36 L.Ed.2d 687 (quoting Justice Baldwin in *Bonaparte v.*

Camden, C.D.N.J. 1830, 3 Fed. Cas. 821, 827 (No. 1, 617)).

In the instant case, plaintiffs have failed to carry their burden of establishing that they are entitled to the extraordinary relief sought for the following reasons.

I. Plaintiffs have not established a likelihood of success on the merits.

Plaintiffs have limited their motion to the issue of prompt judicial review. However, because Chapter 6.54 fulfills the dictates of *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596, 493 U.S. 215, 107 L.Ed.2d 603 (1990), there is little likelihood that plaintiffs will succeed on the merits. In *FW/PBS*, the Supreme Court held that restraint may be imposed on protected speech prior to judicial review when: (1) the decision-maker has limited discretion, (2) the decision whether to issue the license is made within a specified and reasonable time period during which the status quo is maintained, and (3) there is the possibility of prompt judicial review in the event that the license is erroneously denied. *FW/PBS*, 493 U.S. at 225-228, 110 S.Ct. at 605-06.

Chapter 6.54 gives the Board very limited discretion and it ensures that the license will be issued or denied within a specified and reasonable time period during which the status quo is maintained. §§ 6.54.040 and 6.54.070. In addition, the possibility of prompt judicial review exists. § 6.54.160.

A. The Board has limited discretion.

The Board's discretion to deny a license or permit is specifically limited in sections 6.54.040(C)(1) and 6.54.070. The board may only deny a license or a permit for four reasons: (1) the applicant has been convicted of a defined sexually-related felony in the past five years or a misdemeanor within the last two years; (2) the applicant has violated the provisions of the zoning code applicable to sexually oriented businesses within the past two years; (3) the applicant has given false information on the application or has omitted material information from the application; or 4) the applicant has refused to give any information relevant to the investigation of the application or refused to appear for examination under oath regarding the application.

Except for the reason of furnishing false information or omitting material facts from the application, these reasons for denial were examined by the Sixth Circuit in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (rehearing and suggestion for rehearing *en banc* denied April 15, 1997). In *DLS*, The Sixth Circuit ruled that the challenge of the substantive requirements of the licensing procedure was without merit. *Id.*, at 414. Similar to Chapter 6.54, the substantive requirements for the issuance of a license or permit under the Chattanooga ordinance are that the applicant: (1) must be at least eighteen years of age; (2) must not have been convicted of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature" within the past five years; and (3) must not have been found to have violated the ordinance within the past five years. Chattanooga, Tenn.,

City Code §§ 11-425, 11-428. (Exhibit 3). Examining these criteria, the Sixth Circuit stated:

> In our view, the ordinance survives the First Amendment challenge; it does not allow City officials to "exercise discretion by passing judgment on the content of the protected speech," *FW/PBS. Inc. v. City of Dallas*, 493 U.S. 215, 229, 110 S.Ct. 596, 607. 107 L.Ed.2d 603 (1990), and it **sufficiently limits the discretion of the decision-maker.** *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771 (1988); *DLS, supra* at 414. (emphasis added).

According to the Sixth Circuit, the only criteria which was not "wholly objective" was the requirement that the applicant not be convicted of a "crime of moral turpitude." *DLS* at 414-15. However, the Sixth Circuit found that this is a defined term of art in Tennessee. *Id.* The Sixth Circuit concluded that:

> [T]he decision-maker under the Chattanooga ordinance is constrained by objective criteria, and the standards for licenses and permits under §§ 11-425 and 11-428 do not violate the First Amendment. *DLS*, at 415.

Thus, like the substantive requirements found to limit the discretion of the decision-maker under the Chattanooga ordinance, essentially the same requirements serve to limit the discretion of the Board under Chapter 6.54.

Like denials, suspensions and revocations of licenses and permits are also limited to specific circumstances

under Chapter 6.54.[4] Further, the Board has the authority to fine any license or permit holder for violation of any of the provisions of Chapter 6.54. *See*, § 6.54.150, penalties and prosecutions. Based on the above discussion, it is clear that the ordinance vests the administrative decision

---

[4] Under section 6.54.140 the Board shall revoke (or suspend) a license or permit only if one of the following conditions is found to exist:

- it discovers that false or misleading information or data was given on any application, or material facts were omitted from any application;
- the operator or entertainer becomes ineligible to obtain a license (or permit) by being convicted of a (specified) crime of a sexual nature;
- any cost or fee required to be paid by this chapter is not paid;
- an operator employs an entertainer who does not have a permit or provides space to an independent contractor who works as an entertainer without a permit;
- any liquor, beer, or narcotic is sold or allowed to be sold on the licensed premises;
- any operator, employee or entertainer sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material;
- any operator, employee or entertainer denies access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;
- any operator allows continuing violations of the metropolitan code or the rules and regulations of the following departments: health, codes, fire, or zoning, or any violations of this chapter;
- any operator fails to maintain the licensed premises in a clean, sanitary and safe condition in accordance with the applicable statutes, ordinances and regulations of the federal, state and local governments; or
- the attempted transfer of a license/permit or any interest in a license/permit shall automatically and immediately revoke the license.

maker (the Board) with very limited discretion. Therefore, Chapter 6.54 fulfills the first prong of the test under *FW/PBS*.

B. The Board must make its decision within a limited, reasonable amount of time.

1. Application procedure.

The second prong of the test under *FW/PBS* is that the decision to grant or deny the license or permit must be made in a specific, reasonable period of time. *FW/PBS*, 493 U.S. at 226. Chapter 6.54 sets out a time limit for every step of the administrative process, and these time limits are reasonable. Therefore, Chapter 6.54 passes this prong of the *FW/PBS* test.

In *DLS, supra*, the District Court considered the time limits for issuing a license or a permit under the subject ordinance. *DLS, Inc. v. City of Chattanooga*, 894 F.Supp. 1140 (E.D.Tenn. 1995). The Chattanooga ordinance provides for a maximum time period of sixty days, from the date of the application to the date of the initial administrative decision. Then, after an adverse initial decision by the city treasurer, an applicant has ten days to request a hearing before the City Council. Chattanooga City Code § 11424(d). Based on these time limits, the District Court stated:

> While the Ordinance does not specify that the City Council must meet within any specified period of time, the Ordinance can be construed to require a meeting within a reasonable period of time. If the City Council denies a license application, the City Attorney shall within five days institute suit for declaratory judgment in state

> court for review of the denial. *Id.* It is very clear that the Ordinance's licensing procedure **places specified brief time limits on the decision-makers and does provide for prompt judicial review.** This procedure, therefore, does not contravene the First Amendment. *DLS, supra*, 894 F. Supp., at 1148.

Similarly, Chapter 6.54 has set out a list of specified reasonable time limits in which all steps in the procedure must occur. Once the application is filed it must be "distributed promptly" to the necessary departments. Section 6.54.040(A)(1). The Board has interpreted "distributed promptly" to mean that the application shall be accepted by the administrator and sent out that day, or if it is submitted anytime after 4:00 p.m., then it must be sent out the following business day. Board Policy 5, collective exhibit 2. The departments of Fire, Health and Codes Administration **must** complete their respective inspections and present their reports to the Board within thirty days. Section 6.54.040(B)(3). Once the inspections are completed and the reports are filed with the Board, the Board has twenty days to examine the application and the reports and decide to grant or deny the license. Section 6.54.040 (C)(1). In addition, under Chapter 6.54 the Board (like Chattanooga) may hold an application for an additional thirty (30) days for further investigation. Sections 6.54.040(C)(7) and 6.54.070(D). Finally, the Board has adopted policy no. 70 which provides that any failure of the Board to act within the time allowed by the ordinance on any application shall result in the application being granted. *See*, collective exhibit 2.

Thus, under Chapter 6.54, a maximum period of eighty-one days can elapse between the filing of the

application and the initial administrative decision whether to grant or deny a license or permit. This is only twenty-one days longer than the sixty day period the District Court found constitutional in *DLS,* and which the Court found constitutional in *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1570 (M.D.Tenn. 1989). Thus, the time limit placed on the administrative decision-maker in Chapter 6.54 is constitutional.

2. Denial of application.

Should an application be denied, the applicant has the option of requesting a hearing before the Board. If the applicant wishes to proceed directly to Chancery Court without a hearing before the Board, the applicant may do so. Under section 6.54.040(E)(1)(f), the denial of an application becomes final ten days after the applicant is notified of the denial; provided that the applicant does not request a hearing before the Board within that ten day period. It is only at the option of the applicant that the Board hears the case (and thereby delays judicial review of the Board's initial decision). Section 6.54.070(D)(7) states: "**Any** denial of the application for a permit may be immediately appealed to the Chancery Court of Davidson County." (Emphasis added).

3. Hearing of a denial by the board.

If the applicant wishes to bring the matter before the Board, the applicant may request a hearing within ten days from the date the applicant is notified that the application was denied. Section 6.54.040(E). Once the request is made, the Board will hear the matter at the next meeting which, since the ordinance requires that the

board meet twice a month, would be fifteen days from the request at most. Sections 6.54.020(D)(1) and 6.54.040(E)(1)(b). At the hearing, the Board will grant or deny the license or the permit. Section 6.54.040(E)(1)(d). If the license or permit is denied, the Board will announce that denial at the meeting. *Id.* Written notification of the Board's decision will be issued immediately. *Id.* The applicant has the choice of waiting to receive written notification of the Board's action before filing a Chancery Court action, or to file a Chancery Court action immediately upon the Board taking action at its meeting. Section 6.54.040(E)(2). The only time period over which the applicant has no control is the time from the request for a hearing to the time of the Board's next meeting (which would be a maximum of 15 days). However, awaiting the Board to conduct a hearing is entirely in the applicant's discretion since the applicant may elect to proceed to Chancery Court immediately upon the initial denial of the application. At most, a Board hearing would occur ~~81~~ 96 days after the application is filed.

C. The possibility of prompt judicial review exists.

1. Local Rules §§ 30.02 and 30.03 provide for the possibility of prompt judicial review.

Local rules §§ 30.02 and 30.03, when read together, satisfy the third requirement of *FW/PBS*: that the possibility of prompt judicial review exist. (Exhibit 4). Rule 30.02 provides, among other things, that upon motion of a party, or upon its own motion, a court may shorten the time for filing briefs in a case brought under the common law writ of certiorari as an appeal of an administrative decision.

Rule 30.03 then provides that hearings for oral argument shall be set as provided in Local Rule 18 after the record has been filed. (Exhibit 5).

Chapter 6.54 provides that the Metropolitan Government shall file the administrative record within 10 days from the date it was served. Section 6.54.040(E)(2). Thus, in order to provide prompt judicial review, the applicant can move the Chancery Court to establish an expedited briefing schedule, and, pursuant to Local Rule 18.01, the applicant may move the Court to set an early trial date, and receive prompt judicial review.

Contrary to plaintiffs' assertion, T.C.A. 27-9-111 does not act as a bar to prompt judicial review of a matter brought under the common law writ of certiorari. The statute merely states, in pertinent part, that "at the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial. . . . " There is no prohibition against setting such a case for trial prior to ninety days from the filing of the transcript. Defendants submit that to the extent T.C.A. 27-9-111 purports to establish such a prohibition, it violates the separation of powers doctrine, as set forth in Article II, Section 2 of the Tennessee Constitution. One of the inherent powers of a court is its ability to manage its own docket, including the authority to make such decisions as when to set cases for trial. Clearly, Local Rules 30.02, 30.03 and 18 provide the means by which the Courts of the Twentieth Judicial District establish briefing schedules and trial dates in matters brought under the common law writ of certiorari. To the extent that plaintiffs argue that T.C.A. 27-9-111 may attempt to impair the independent exercise of the inherent judicial power of the court to manage its own docket, the statute is unconstitutional. See, *Summers v.*

Thompson, 764 S.W.2d 182, 188-190 (Tenn. 1988) (Justice Drowota, concurring).

In addition, the plaintiffs' interpretation of T.C.A. 27-9-111 would result in the conclusion that this statute violates the Supremacy Clause of the U.S. Constitution. Given the clear Supreme Court holdings that prior restraints on alleged First Amendment rights must be subject to prompt judicial review, if the statute mandates the result advocated by plaintiffs, the statute would prevent such review in these cases, and would be constitutionally infirm.

2. An applicant may seek Chancery Court relief in the form of an application for a temporary restraining order or a request for a preliminary injunction.

Plaintiffs cite *East Brooks Books v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), *cert. denied* ___ U.S. ___, 116 S.Ct. 227, 133 L.Ed.2d 198 (1995), for the proposition that there can never be "prompt" judicial review of an administrative decision in Tennessee as a result of the alleged built-in 90 day delay required by Tenn. Code Ann. § 27-9-111. Plaintiffs contend that prompt judicial review is precluded by the fact that this 90 day period will be required to pass before the matter may stand for trial. Under plaintiffs' theory, this 90 day requirement fatally flaws any legislative enactment which contemplates the writ of certiorari as the sole vehicle of judicial review. However, while the ordinance at issue in *East Brooks Books* **required** the applicant to seek review of the administrative decision by a common law writ of certiorari proceeding in accordance with Tenn. Code Ann. § 27-9-111,

the subject ordinance does not limit the applicant to that one vehicle of judicial review. Indeed, it is doubtful that a local legislative body would have the power to limit avenues of judicial review, even if it chose to attempt to do so.

Plaintiffs also refer to the case of *Smith v. City of Clarksville*, No. 3-94-0539, (M.D. Tenn., slip opinion dated 3-14-96, Echols, J.), a copy of which is attached to their motion as Exhibit E. The Clarksville ordinance at issue in *Smith, supra*, allowed for appeal "to a court of competent jurisdiction." In its opinion, the Court did not consider, and there is no indication the defendant raised, the possibility of prompt judicial review by also requesting a temporary restraining order or preliminary injunctive relief. The Court's analysis was limited to considering a petition for a writ of certiorari. The Court ruled that it was constrained by the Sixth Circuit's holding in *East Brooks Books* to find that the possibility of prompt judicial review did not exist. *Smith*, supra, at 16.

Though Chapter 6.54 provides for an appeal to the Chancery Court of Davidson County, the ordinance itself does not limit plaintiffs' judicial remedies. Chapter 6.54 specifically states:

> The denial of any renewal for a license (or a permit) may be appealed to the chancery court of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the chancery court for Davidson County. **If the applicant or the permittee/licensee *chooses* to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings to date (the date of the filing) with the court within ten days from the**

> **date the metropolitan government was served.** Chapter 6.54.100(M). (Emphasis added).
>
> Any revocation or suspension of a license or a permit or any denial of a license or a permit or any denial to renew a license or a permit under the provisions of this chapter may be immediately appealed to the chancery court of Davidson County by the applicant. Any fine levied under the provisions of this chapter may be immediately appealed to the chancery court of Davidson County by the applicant. The metropolitan department of law may institute proceedings for a declaratory judgment in the chancery court of Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings to date (the date of the filing) with the court within ten days from the date the metropolitan government was served. Chapter 6.54.160.

All that is constitutionally required is the availability to the applicant of prompt judicial review in the event the application is erroneously denied, suspended or revoked. *FW/PBS, supra*, 110 S.Ct. at 606. The Sixth Circuit found that the ordinance at issue in *East Brooks Books* did not allow for the possibility of prompt judicial review because that ordinance **mandated** the common law writ of certiorari as the sole avenue of judicial review. Thus, *East Brooks Books* is distinguishable on its facts. In *Smith, supra*, the Court adhered to the holding in *East Brooks Books*, limiting its analysis to the common law writ of certiorari as the sole vehicle to review the administrative decision at issue. Defendants respectfully submit, however, that the *Smith* court was not called upon to consider whether the availability of a temporary restraining order

or a promptly considered motion for preliminary injunction accompanying a writ of certiorari would satisfy the requirement of "prompt judicial review." Indeed, the Fifth Circuit has opined that the availability of a temporary restraining order satisfies the prompt judicial review requirement. *See Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068, 1070-71 (5th Cir. 1994).

The District Court, in *DLS, supra*, 894 F. Supp. at 1148, found the "prompt judicial review" requirement was met by the provision that upon final adverse administrative action, the City Attorney for Chattanooga would institute suit for a declaratory judgment in the Chancery Court of Hamilton County within five days, and would seek an immediate judicial determination of whether the license or permit may be denied under the law. Chattanooga City Code, § 11-424(d). However, if an applicant petitions for a temporary restraining order, or requests a prompt hearing on a motion for a preliminary injunction, the initial judicial review will be obtained faster than in the course of a declaratory judgment action. Since the availability of a declaratory judgment action satisfied constitutional muster in *DLS*, certainly the possibility of obtaining a temporary restraining order or a preliminary injunction satisfies the initial prompt judicial review requirement in the instant case.

3. The proposed new local rule will provide prompt judicial review.

If the Court is not already persuaded that the Davidson County courts will afford these plaintiffs prompt judicial review, defendants respectfully offer proposed new Local Rule § 30.05 to the Davidson County Rules of

Practice, the text of which is reprinted in its entirety here, and filed as Exhibit 6:

> § 30.05 Expedited Appeals
>
> If the petitioner-appellant alleges that the decision of an administrative tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

Since the Davidson County courts are the forum for adjudication of all appeals from state agencies, the Davidson County Circuit and Chancery Courts have adopted local rules to specifically manage appeals from administrative decisions. Under the proposed new rule, an applicant would have a decision by the Chancery Court within twenty-five days after the license/permit has initially been denied, suspended or revoked by the Board. This twenty-five day period includes an allowance for the filing of the Chancery Court appeal and service upon the Metropolitan Government (1 day after denial), the filing of the record (10 days after service), and the Chancery Court hearing and decision (14 days after filing the record). This is prompt judicial review.

II. The prospect of irreparable harm to plaintiffs weighed against the likelihood of harm to others.

The possibility of the proposed local rule leads to consideration of the issue of the irreparable harm plaintiffs suggest they will suffer to justify the preliminary injunctive relief requested in their complaint. Chapter 6.54, by its terms, allows sexually oriented businesses to continue to operate, and requires them to apply for a license within 120 days from the effective date of the ordinance. § 6.54.030(F)(1). The ordinance became effective on November 1, 1997, and the 120 day period expires on March 1, 1998. Similarly, entertainers wishing to perform entertainment at sexually oriented businesses have 45 days from November 1, 1997 to apply for a permit under the ordinance. § 6.54.060(B). This time period expires on December 15, 1997. Until that time they may continue to perform. Both categories of applicants may continue to conduct business during the pendency of their applications until the Board has acted on the applications. §§ 6.54.030(F)(1) and 6.54.060(B). Thus, there is no likelihood of harm during the pendency of their applications.

No infringement on any license or permit applicant's alleged First Amendment rights can occur until, at the earliest December 25, 1997 for a permit applicant, or March 11, 1998 for a license applicant, since any denial is stayed for ten days after the Board's decision. Plaintiffs cannot show that they will be irreparably harmed before Christmas, 1997. Defendants respectfully request that no temporary injunction issue before December 25, 1997, if the Court determines it requires a local rule to evidence the Davidson County Courts' intention that cases such as the ones at issue will be afforded prompt judicial review.

Defendants submit there is no possibility of harm to plaintiffs until that date, and there is the possibility that the proposed Local Rule § 30.05 may be adopted by that time, thus resolving any concern the Court may have regarding the availability of prompt judicial review.

Plaintiffs' alleged injury is the chilling of their First Amendment rights. They allege no monetary loss or any other type of harm. Plaintiffs have not closed any business locations nor have they alleged that their business practices or exhibitions have changed in any way. Plaintiffs have not applied for a license or a permit or attempted to comply with the regulations contained in the ordinance. There are no specific allegations which in any way demonstrate that the ordinance has harmed the businesses or impaired plaintiffs' ability to display and sell sexually explicit material.

The Supreme Court has held that subjective "chill" is not enough to constitute injury in fact. *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972). Justice Powell's concurrence in *Young v. American Mini Theaters*, 427 U.S. 50, 96 S.Ct. 2456, 49 L.Ed. 2d 318 (1972), listed two factors to be considered in assessing the harm suffered by the plaintiffs under the zoning ordinance at issue in that case saying:

> The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom

> they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?

Young, 427 U.S. 78-79, 96 S.Ct. 2456. Justice Powell went on to answer both inquiries in the negative saying:

> At most the impact of the ordinance on these interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [adult films]. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience.

Young, 427 U.S. 78-79, 96 S.Ct. 2456 (Justice Powell concurring).

Plaintiffs have failed to show that they will suffer any harm, much less irreparable harm, from the enforcement of Chapter 6.54. Without a showing of irreparable harm, plaintiffs are not entitled to an injunction.

Alternatively, there is the likelihood of substantial harm to others. In this case the "others" are the residents of Nashville and Davidson County. The granting of an injunction will result in continued harm to individuals impacted by the secondary effects of plaintiffs' activities. *See, e.g. Renton v. Playtime Theatres. Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Plaintiffs have failed to show the irreparable harm they will suffer in the event the injunction is not granted, therefore they are not entitled to an injunction.

III. The public interest is advanced by preventing the harmful secondary effects caused by sexually oriented businesses.

Plaintiffs claim that the public interest is in free expression. However, plaintiffs' continued operation and continued display of sexually explicit material demonstrates that their First Amendment rights are in no way chilled by the potential enforcement of the ordinance. Even if plaintiffs' First Amendment rights are at issue, it is the right to convey erotic messages, not, for example, the right to political speech which is in jeopardy. Erotic messages are not entitled to the same protection given to political speech. As the Supreme Court stated in *Young*:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.
>
> *Young*, 427 U.S. 70, 96 S.Ct 2452.

In this case, the public's interest lies in having the government protect its citizens from crime, disease, and urban blight, and in seeing that the laws designed to protect the public are enforced. This is the interest that militates against the extreme remedy of granting plaintiffs an injunction.

Chapter 6.54 regulates activity in a manner recognized by the courts to be of substantial interest to the government. Because plaintiffs' First Amendment rights are not burdened by implementation of the ordinance, the

public interest will best be served by allowing the ordinance to take effect.

CONCLUSION

Plaintiffs are not entitled to an injunction because they are unable to show they are likely to succeed on the merits. In determining whether to grant, deny, suspend or revoke a license or a permit, the discretion granted to the Board is limited. The Board is required to make a decision in a specified, brief period of time. The availability of a temporary restraining order and prompt injunctive relief demonstrate that plaintiffs have the possibility of prompt judicial review. Therefore, defendants respectfully submit that plaintiffs are not entitled to an injunction because they cannot show that they are likely to succeed on the merits or that they will suffer irreparable harm if an injunction does not issue. Furthermore, the public will suffer harm if the injunction is granted, and the societal concerns which prompted enactment of Chapter 6.54 will continue to exist, unabated. All the factors to be considered weigh in favor of denying the extraordinary remedy of an injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing RESPONSE has been sent via Federal Express and electronic mail to Bradley J. Shafer, 1902 Yuma Trail, Okemos, MI 48864 and via Federal Express and facsimile to (901)572-7399 to Michael F. Pleasants, 1916 Central Avenue, Memphis, TN 38104, on this day the 26th of November, 1997.

/s/ Shayna Abrams
Shayna Abrams

No. 05-1194

(3)

Supreme Court, U.S.
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In The
Supreme Court of the United States

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 118

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ALTERNATIVE QUESTION PRESENTED

Respondents submit that in light of the proceedings below, Petitioner's first question presented should properly be phrased as follows:

(1) Does a final judgment confirming a plaintiff's status as a "prevailing party" for purposes of 42 U.S.C. § 1988, no longer open on direct review, which is followed by a United States Supreme Court decision in another case that invalidates the theory on which the plaintiff prevailed, qualify as "special circumstances" that render the attorneys' fees award unjust?

LIST OF PARTIES BELOW/PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

All parties to the proceedings in the Sixth Circuit below are listed in the caption of this case as set forth in the Petition for a Writ of Certiorari.

Respondent Deja Vu of Nashville, Inc. states that its parent corporation is Dynamic Industries, Ltd., a Delaware (non-public) corporation. There is no publicly held company owning 10% or more of the stock of Deja Vu of Nashville, Inc.

Respondent Meroney Entertainment, Inc. states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of Meroney Entertainment, Inc.

Respondent The Pleasure Palace, Inc. states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of The Pleasure Palace, Inc.

Respondent The 822 Corporation states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of The 822 Corporation.

Respondent 421 Corporation states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of 421 Corporation.

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42 U.S.C. § 1988 ..... *passim*

S. Rep. No. 94-1011 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910; H.R. Rep. No. 1558, 94th Cong., 2d Sess., (1976) 27, 28

T.C.A. § 27-8-101 2

T.C.A. § 27-9-111 ..... *passim*

The Metropolitan Code of Laws, Chapter 6.54 ..... *passim*

FEDERAL RULES OF CIVIL PROCEDURE:

Fed.R.Civ.P. Rule 60(b) 6, 15

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Deja Vu of Nashville, Inc. ("*Deja Vu*"), Michael Rucker, Michael Butler, Meroney Entertainment, Inc. ("*Ken's Gold Club*"), the Pleasure Palace, Inc., Dawn Pierce, Elizabeth Martz, Jerry C. Pendergrass, The 822 Corporation and 421 Corporation (collectively "Respondents" or "Plaintiffs"), respectfully request that this Court deny the Petition for a Writ of Certiorari ("Petition") filed by the Metropolitan Government of Nashville and Davidson County (sometimes "Petitioner," or "Defendant," or "Metro") to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case.

ADDITIONAL OPINIONS BELOW

The district court's opinion and order vacating the permanent injunction are unreported and are found at App. 8-17.[1]

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. § 1983 are found at App. 20, and the text of U.S.C. § 1988 is reproduced at App. 18-19. Chapter 6.54 of the Metropolitan Code of Laws has undergone numerous changes during the pendency of

[1] The Appendix hereto will be identified as "App.," and references to the Appendix as contained in the Petition will be abbreviated as "Pet. App."

this litigation. That ordinance was originally enacted by Bill No. O97-796 (App. 24-89); the first set of amendments thereto appears in Bill No. SO97-1022 (App. 90-118); the second set of amendments is contained in Bill No. O99-1503 (App. 119-161); the third set of amendments is set forth in Bill No. O99-1814 (App. 162-175); the fourth set of amendments are found in Bill No. BL99-61 (App. 176-181); and the last set of amendments are embodied in the revised codified version of Chapter 6.54 which is reproduced at App. 182-241.

In addition, the Petition refers to T.C.A. § 27-9-111 as the "Tennessee Writ of Certiorari Statute. . . . " Petition, p. 2. It is not. Throughout this litigation (at least up until the filing of the current Petition), Metro has taken the position that review of decisions of the Metropolitan "Sexually Oriented Business Licensing Board" is exclusively by way of the Tennessee common-law writ of certiorari, which is found at T.C.A. § 27-8-101 and which is reproduced at App. 21.

COUNTER-STATEMENT OF THE CASE

Respondents aver that Petitioner's Statement of the Case lacks sufficient detail, and set forth the following Counter-Statement of the Case.

The Petition has been filed in response to various awards for attorney fees and costs issued pursuant to 42 U.S.C. § 1988. These awards arose out of two actions commenced pursuant to 42 U.S.C. § 1983, which challenged the constitutionality of an ordinance enacted by the Petitioner generally known as Chapter 6.54 of the Metropolitan Code of Ordinances ("Ch. 6.54," or simply the

"Ordinance"). The Ordinance required the licensing of, and otherwise further regulated, certain "adult" businesses and individuals associated with them, and the original version thereof was enacted through the adoption of Bill No. O97-796 on August 19, 1997, which is found at App. 24-89.

On October 17, 1997, before individuals and businesses were required to file applications for licenses, Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., The Pleasure Palace, Inc., Dawn Pierce, and Elizabeth Martz (the "*Deja Vu* Plaintiffs") filed suit in the United States District Court for the Middle District of Tennessee, Nashville Division, seeking to enjoin and declare unconstitutional Ch. 6.54. The *Deja Vu* Plaintiffs also filed a motion for preliminary injunction at that time.

On November 20, 1997, Jerry Pendergrass, the 822 Corporation, and the 421 Corporation (the "Pendergrass Plaintiffs"), filed a similar action in the same court, which was consolidated with the *Deja Vu* action.

The legal challenge brought by the *Deja Vu* Plaintiffs in their motion was limited to a claim that the Ordinance failed to contain the requisite procedural guarantees mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965). The *Deja Vu* Plaintiffs reserved all other legal challenges. The Pendergrass Plaintiffs joined in that motion but added a claim that the "civil disability" provisions of Ch. 6.54 – which precluded the licensing of individuals who had previously been convicted of certain enumerated crimes – were unconstitutional.

On December 1, 1997, a hearing was held on the preliminary injunction motions, after which the district

court entered an Order and Memorandum enjoining Ch. 6.54 in its entirety because of the lack of *Freedman* procedural guarantees. Pet. App. 180a-200a. The court declined to rule on the civil disability issue, finding it unnecessary in light of the *Freedman* ruling. Pet. App. 197a.

Metro then enacted *eighty-four* amendments to Ch. 6.54. App. 90-118. Based upon some of these changes and the adoption by the Tennessee legislature of a "judicial review" procedure statute (T.C.A. § 27-9-111(e), found at Pet. App. 272a-274a), Metro filed a motion to dissolve the preliminary injunction, contending that Ch. 6.54 was now constitutional. App. 242-245. Over the objections of the Plaintiffs, the district court lifted the preliminary injunction on December 3, 1998. Pet. App. 162a-179a. The Plaintiffs filed a Notice of Appeal challenging that ruling.

The Plaintiffs then filed second motions for injunctive and declaratory relief which, at the insistence of Defendant and pursuant to court order, included therein all of the other constitutional challenges that they desired to litigate by way of a preliminary injunction but which had been reserved (or not ruled upon) in the first motions. App. 2. In addition, pursuant to leave of court, Plaintiffs filed a motion for interim attorney fees predicated upon the entry of the first preliminary injunction and the subsequent developments. That motion was – and all later fee motions were – referred to the Federal Magistrate for consideration.

After the filing of Plaintiffs' second motions for preliminary injunction, but before the district court had an opportunity to adjudicate the issues set forth therein, Metro enacted *ninety-two* amendments to Ch. 6.54 in an

effort to cure the constitutional deficiencies pointed out in the Plaintiffs' briefing. App. 119-161.

The second motions for preliminary injunction were litigated in a three-day evidentiary hearing between April 13 and April 15, 1999. Following the evidentiary hearing, but before the district court ruled on the motions, Metro enacted *fifty-two* additional changes to Ch. 6.54. App. 162-175.

The district court thereafter granted the second motions for preliminary injunction, enjoining the Ordinance in its entirety. Pet. App. 109a-161a. The Plaintiffs then filed a motion for leave to file a second motion for interim attorney fees, which was granted. The district court then conducted a status conference to inform the parties of its intent to convert the preliminary injunction into a permanent injunction, which it ultimately did by entering a final judgment to that effect. Pet. App. 107a-108a. Consequently, Chapter 6.54 was permanently enjoined in its entirety.

On January 18, 2000, Metro enacted an additional *seven* amendments to Ch. 6.54 to supposedly address the various rulings of the district court. App. 176-181. Six days after these amendments were enacted, Metro filed a Notice of Appeal in regard to the Order granting a permanent injunction, and the Plaintiffs then filed a Notice of Cross-Appeal. Plaintiffs also filed their second motion for "interim" attorney fees on January 21, 2000, which by that time constituted a request for fees and costs in furtherance of a final judgment.

At oral argument on the initial appeal (regarding the lifting of the first injunction), a panel of the Sixth Circuit concluded from the bench that the various then-pending

appeals should be consolidated, and declined to hear argument at that time.

On May 5, 2000, Metro filed a Motion to Vacate or Dissolve Injunction pursuant to Fed.R.Civ.P. Rule 60(b), predicated upon the seven latest amendments to the Ordinance. The district court denied that motion, finding that it was without jurisdiction to hear the matter in view of the filing of Metro's Notice of Appeal. App. 4. On June 23, 2000, Metro then filed a Notice of Appeal in regard to that ruling (this being the fourth then-pending appeal).

- Metro then filed a motion in the Sixth Circuit Court (as part of the fourth appeal) for a limited remand so as to permit the district court to rule on the Rule 60(b) motion. That motion was denied by an Order entered October 4, 2000, although that appeal was then consolidated with the three other appeals. App. 5-6.

After a hearing on the four appeals, the Sixth Circuit issued an opinion on December 6, 2001, affirming in part and reversing in part, but maintaining the injunction in place. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2001), ("*Deja Vu I*"). Pet. App. 28a-75a. In addition, the Sixth Circuit did not fault the district court for denying the Rule 60(b) motion, noting Metro's concession at oral argument that the filing of that appeal had been a "procedural misstep." *Id.* at 403. A petition by the Defendant for rehearing and suggestion for rehearing *en banc* was denied by the Sixth Circuit on February 5, 2002. App. 7.

On January 7, 2002, Plaintiffs filed a third motion for attorney fees and costs, predicated primarily upon work expended on the various appeals.

In light of the various rulings by the Sixth Circuit, Metro enacted an additional series of amendments to Ch. 6.54, with the revised codified version of the Ordinance appearing at App. 182-241. In addition, the Tennessee legislature adopted conditional revisions to T.C.A. § 27-9-111(e) – the procedural statute enacted after the first ruling of the district court enjoining Ch. 6.54 – which were to take effect, however, only in the event that this Court denied Metro's petition for a writ of certiorari on that issue. *See, e.g.*, App. 22-23 (discussed in the Historical and Statutory Notes), and Pet. App. 212a.

Indeed, the Defendant filed a petition for a writ of certiorari in this Court, which was denied on May 13, 2002. *Metro. Gov't of Nashville and Davidson County v. Deja Vu of Nashville, Inc.*, 535 U.S. 1073 (2002). This ruling essentially ended the "merits" portion of this litigation, with Plaintiffs being "prevailing parties" pursuant to 42 U.S.C. § 1988 in that Ch. 6.54 was – in its entirety – permanently enjoined from enforcement.

After this Court denied the petition for a writ of certiorari, Plaintiffs filed their fourth motion for attorney fees and costs, which sought reimbursement for work primarily involved in responding to that petition and working on that fee request.

Defendant never objected to the hourly rates charged by the primary attorneys representing the Plaintiffs. In addition, because one of the Plaintiffs' attorneys was on "retainer" with his client, absolutely no claim for reimbursement of his time was sought. App. 274-275, ¶¶ 1-5; App. 298-299, ¶¶ 1-5. Plaintiffs also substantiated, by affidavit, that not all time incurred had been requested for reimbursement; that billing judgment had been exercised;

and that counsels had coordinated with one-another to negate, or at least minimize, duplication of effort. *See, e.g.*, App. 281-283, ¶¶ 8, 11-12; App. 278, ¶ 6; and App. 288-291, pp. 2-5.

On September 30, 2002, Magistrate Judge Juliet Griffin issued her Report and Recommendation granting, in part, the first three motions for attorney fees. Pet. App. 79a-106a. Specifically finding that it was impossible to accurately apportion the time spent on various issues, since the work on the issues upon which Plaintiffs prevailed had to have been intertwined with work on issues upon which the Plaintiffs did not prevail, she reduced the attorney fee claim for work done on the appeal to the Sixth Circuit by two thirds. Pet. App. 104a-105a. In addition, the Magistrate disallowed a significant portion of fees for work that was either performed regarding issues upon which Plaintiffs did not prevail in the district court, or work that was not specifically characterized. Pet. App. 95a-102a. She also denied Plaintiffs' requests for costs, with leave to refile these claims accompanied by a detailed explanation of the necessity and propriety of the expenses. Both Plaintiffs and Defendant filed objections to this Report and Recommendation. App. 300-302 and 303-315. Additionally, Plaintiffs refiled their motion for costs and expenses, seeking reimbursement of $58,565.66 in costs. The Defendant never filed a response to that motion.

On December 5, 2002, District Court Judge Todd J. Campbell issued an Order adopting the Report and Recommendation, but since Magistrate Griffin had not included a final total of the amount owed, Judge Campbell requested that the parties stipulate to that figure. Pet. App. 77a-78a. In furtherance of that Order, the parties submitted a Stipulated Notice stating that $367,080.37

was awarded to Shafer & Associates, P.C.; $10,928.36 was awarded to the law firm of Michael Pleasants; and $53,090.83 was awarded to Sirkin, Pinales, Mezibov & Schwartz. App. 316-318.

Magistrate Griffin later issued a second Report and Recommendation on September 16, 2003, granting Plaintiffs' fourth motion for attorney fees in the amount of $46,870.00. Pet. App. 26a. In addition, noting that the Defendant had failed to file any opposition to the refiled motion for costs, the Magistrate awarded Plaintiffs their expenses in the amount of $58,565.66. Pet. App. 27a. Judge Campbell approved this Report and Recommendation by an Order entered on September 30, 2003. Pet. App. 18a.

On the same day that Order was issued, Defendant filed what can only be described as a perfunctory objection to the second Report and Recommendation. App. 319-321. Defendant raised no objection therein to the attorney fees claimed in the proceedings before this Court. Rather, Metro objected to certain fees claimed for work done on Plaintiffs' second and third fee petitions, and simply claimed – in a conclusory fashion – that *those fees* should be reduced "by at least two-thirds." App. 320. Pursuant to a motion to amend or alter the final order on attorney fees to reflect the fact that Defendant had, indeed, timely objected to the Report and Recommendation, the district court acknowledged the objections but found nothing in them to justify changing its prior order. Pet. App. 76a. Metro appealed.

During the pendency of the attorney fee award appeal, this Court rendered its ruling in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

On February 25, 2005, which was over eight months following the ruling by this Court in *Z.J. Gifts*, but five years and one month after Chapter 6.54 was amended to purportedly correct the constitutional deficiencies affirmed by the Sixth Circuit in *Deja Vu I*, and two years and nine months from the date that the amendments to T.C.A. § 27-9-111(e) went into effect (that being as of this Court's denial of Metro's petition for a writ of certiorari), Metro filed a motion to lift the permanent injunction predicated, in part, upon this Court's ruling in *Z.J. Gifts*. App. 322-325. The district court granted the motion, but declined to rule on *Z.J. Gifts'* applicability to these circumstances because it found the Ordinance and statutory amendments enacted as a direct result of this litigation had cured the constitutional infirmities noted by the Sixth Circuit. App. 15.

Subsequently, the Sixth Circuit conducted oral argument on the fee appeal and affirmed the attorney fees and costs awards. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, Tennessee*, 421 F.3d 417, 418 (6th Cir. 2005) ("*Deja Vu II*"). Pet. App. 1a-17a. The majority held that, even assuming the applicability of *Z.J. Gifts*, Plaintiffs did not lose their status as "prevailing parties." It reached this conclusion by observing that rulings of this Court do not apply retroactively to cases that were not then open on "direct review," and that this case was not so open at the time of the ruling in *Z.J. Gifts* because direct review had been completed when this Court denied certiorari. *Id.* at 420-21.

Moreover, the Court of Appeals held that this case did not present any "special circumstances" that would render the award of attorneys' fees unjust under 42 U.S.C. § 1988, and that *Z.J. Gifts* did not invalidate the theory on which Plaintiffs had prevailed. Succinctly put, the Sixth Circuit

concluded that the decision in *Z.J. Gifts* did not "foreclose the result that was reached by the district court in this case under very different circumstances." *Id.* at 422. Accordingly, the Plaintiffs were entitled to their award of attorneys' fees. *Id.* at 424.

Metro then petitioned for rehearing and rehearing en banc, which was ultimately denied. Pet. App. 201a-202a. The Defendant's Petition followed.

REASONS THAT THE PETITION SHOULD BE DENIED

For over seven years, Plaintiffs had the enforcement of Chapter 6.54 enjoined in its entirety, first by way of a preliminary injunction, and then as a result of the entry of a final judgment granting permanent injunctive relief. Because the challenged Ordinance impacted upon First, Fourth, and Fourteenth Amendment rights, and because Plaintiffs sued Metro under, among other things, 42 U.S.C. § 1983, Plaintiffs, as prevailing parties in this litigation, were entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

"In the absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff. . . ." *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (emphasis in original). Succinctly put, if plaintiffs "succeed on *any significant issue* in litigation which achieves *some of the benefit the parties sought in bringing suit*," an award of attorney fees is warranted. *Hensley v. Eckerhert*, 461 U.S. 424, 433 (1983), *citing Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978) (emphasis added). This occurs if the plaintiff can

"point to a resolution of the dispute which *changes the legal relationship between itself and the defendant.*" *Texas State Teachers' Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis added).

The Petitioner asserts that this Court should grant review of the attorney fee award because after this Court denied a petition for a writ of certiorari on the *merits* of Metro's constitutional defenses, this Court issued its decision in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), which Metro contends abrogated the validity of the previous judicial review ruling of the Sixth Circuit here. This, the Defendant asserts, constitutes "special circumstances" to deny an award of attorney fees pursuant to 42 U.S.C. § 1988. The Petitioner is in error.

I. THIS IS NOT A CASE WHERE "SPECIAL CIRCUMSTANCES" ARE EVEN APPLICABLE.

Even assuming that the ruling in *Z.J. Gifts* is applicable to the decision of the Sixth Circuit on the merits portion of this case (which is it is not, for the reasons as are set forth in Section III, *infra*), "special circumstances" simply do not exist here because the district court has already found that, by adoption of amendments to Chapter 6.54 and revisions to T.C.A. § 27-9-111(e), the constitutional infirmities discussed by the Sixth Circuit in *Deja Vu I* have been corrected as a direct result of this litigation.

When Metro sought to vacate the permanent injunction in 2005, it argued to the district court that the injunction should be lifted because: (a) it had deleted the definition of "sexually oriented" that the Sixth Circuit found to be unconstitutional; (b) changes to T.C.A. § 27-9-111(e)

had rectified the prompt judicial review problem that the Sixth Circuit had noted; and (c) the decision in *Z.J. Gifts* abrogated the Sixth Circuit's judicial review holding in *Deja Vu I*. App. 323-324. The district court agreed with the first two contentions, but further ruled that it "need not decide whether *Z.J. Gifts* dictates the result in this case, since the amended ordinance guarantees prompt judicial review." App. 15.

Consequently, this is not an action where "special circumstances" are even applicable. Rather, it is a normal circumstance where a lawsuit results in a judgment enjoining the enforcement of an invalid law, and the government then, as a result of the court's ruling, attempts to legislatively "fix" the problem. Certainly, pursuant to all existing precedent, attorney fees are warranted in such circumstances.

Carried out to its logical conclusion, the Petitioner in essence would have this Court remand the attorney fee proceedings to have the district court render some type of hypothetical ruling on whether *Z.J. Gifts* indeed abrogates the Sixth Circuit's judicial review ruling in *Deja Vu I*, when that court has already concluded in its decision vacating the permanent injunction that it need not reach the question of how *Z.J. Gifts* might apply to these circumstances. Accordingly, even if there is a split in the circuits on what may constitute a "special circumstance" so as to warrant denial of an attorney fee award, this is not the case to review such an issue given the lower court's previous ruling.

II. "SPECIAL CIRCUMSTANCES" DO NOT EXIST HERE BECAUSE THERE ARE INDEPENDENT GROUNDS JUSTIFYING THE AWARD OF ATTORNEY FEES.

While Metro's entire "special circumstances" argument rests upon this Court's ruling in *Z.J. Gifts*, the attorney fee award includes compensation for work having nothing to do with matters that might arguably be affected by *Z.J. Gifts*. The fee award, therefore, is independently justified.

First, Metro apparently concedes that Chapter 6.54, as originally enacted, did not provide for appropriate prompt judicial review – even in light of *Z.J. Gifts*. *See* Petition, p. 8 n.2 ("... [T]he Metropolitan Government is seeking review of only the attorney's fees that accrued subsequent to dissolution of the first injunction").

Second, not only did Plaintiffs prevail in the district court on the argument that the definition of "sexually oriented" was unconstitutionally vague and overbroad, but the Sixth Circuit chastised Metro for having even appealed that ruling.

> ... [W]e are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. ... For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must.

Deja Vu I, 274 F.3d at 389. Yet, Plaintiffs were compelled to incur attorney fees regarding this issue in the district court and in the appellate court as well.

Third, the Plaintiffs were required to litigate an entire appeal which was clearly, *and admittedly*, unnecessary. In discussing Metro's appeal of the district court's denial of its Fed.R.Civ.P. Rule 60(b) motion, the Sixth Circuit observed that " . . . Metropolitan Nashville concedes that the district court is under no obligation to issue [an order stating that it is disposed to grant a Rule 60(b) motion], and in fact characterized this appeal as a *'procedural misstep'* at oral argument. *We agree.*" *Deja Vu I*, 274 F.3d at 403 (emphasis and clarification added). Nevertheless, Plaintiffs had to incur a significant amount of attorney fees responding to this admitted "procedural misstep."

Fourth, the Magistrate – and by adopting the Report and Recommendation thereof, the district court as well – further noted that Plaintiffs had prevailed on standing and mootness arguments raised by the Defendant, and that it was "not insignificant for the plaintiffs that the Sixth Circuit has spoken definitively on" the issue of the privacy rights as raised by the Plaintiffs with regard to information demanded on license applications. Pet. App. 104a. And, Metro does not contend that the rulings on these matters were in any regard erroneous.

Moreover, in regard to the above matters, it is, of course, relevant that the Magistrate *significantly* reduced the attorney fee claims contained in the first three fee motions. Pet. App. 95a-102a, 104a-105a. The Magistrate did this irrespective of the overlying observation in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that claims for relief which involve a common core of facts require counsel's time to be devoted generally to the litigation as a whole, and "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should *not* have his attorney's fees reduced simply because the district

court did not adopt each contention raised." *Id.* at 440 (emphasis added).[2]

But there are further matters which render the "special circumstances" argument here to be misplaced. This Court specifically denied a petition for a writ of certiorari filed by Metro to examine whether the judicial review provisions of *Chapter 6.54* were consistent with the First Amendment. The fees associated with responding to *that* petition were the primary basis for the fourth motion for attorney fees, and the Magistrate even noted that Metro did "not specifically address any fees requested in the plaintiffs' fourth motion. The plaintiffs are clearly prevailing parties in the matters involved in their fourth motion." Pet. App. 24a, n.2. Similarly, Metro never even filed a response to the Plaintiffs' revised motion for costs and expenses. Pet. App. 26a. Consequently, there is no basis to disturb any of those awards, irrespective of the ruling in *Z.J. Gifts.*

In addition, it should not be lost on this Court that the constitutional attack upon Chapter 6.54 has been a virtual moving target given the fact that Metro has engaged in a never-ending array of amendments to the Ordinance as a result of the constitutional claims raised by the Plaintiffs. Prior to the last set of amendments adopted as a result of the Sixth Circuit's ruling in *Deja Vu I*, Metro enacted no less than *two hundred thirty-five* different revisions to Chapter 6.54 after the Plaintiffs filed suit challenging its constitutionality. And this is not a circumstance where

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[2] In fact, the Sixth Circuit seems to have questioned why the Plaintiffs had not filed a cross-appeal seeking full compensation for all of the attorney time expended in the litigation. *Deja Vu II*, 421 F.3d at 423-24.

Metro could contend that Plaintiffs are not entitled to attorney fees in regard to the matters resulting in these changes because of this Court's decision in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001). Rather, here, Plaintiffs obtained a final judgment and are therefore entitled to reimbursement for all attorney fees reasonably incurred in litigating their claims. *See, e.g., Hensley*, 461 U.S. at 440.

Finally, and probably most importantly, while Petitioner complains only about fees charged *after* the lifting of the first injunction (Petition, p. 8 n.2), *none* of the challenged fees would have been incurred had Metro not incorrectly sought to vacate that injunction pursuant to a still-flawed judicial review process. This is particularly true given that the breadth of the subsequent litigation was set when, pursuant to Metro's request, the district court required the Plaintiffs to raise *all* preliminary injunction claims in their second motions (App. 2), irrespective of the fact that the lower court had previously declined to even rule on the Pendergrass Plaintiffs' civil disabilities argument because of its judicial review ruling. Pet. App. 197a.

For all of these reasons, the attorney fee award as issued by the district court, which significantly *reduced* the claims for reimbursement made by the Plaintiffs, is not the proper case to provide further direction in regard to the "special circumstances" exception, if any is even needed.

III. THIS COURT'S DECISION IN *Z.J. GIFTS* DOES NOT INVALIDATE ANY THEORY ON WHICH THE RESPONDENTS PREVAILED ON THE MERITS OF THIS CASE, AND CANNOT THEREFORE CONSTITUTE A "SPECIAL CIRCUMSTANCE" FOR DENYING FEES.

Irrespective of the other matters upon which the Respondents prevailed below (discussed in Section II, *supra)*, Metro argues that this Court's decision in *Z.J. Gifts* invalidated the "judicial review" ruling of the Sixth Circuit in *Deja Vu I.* Petition, pp. 16-24. The Petitioner is, however, in error.

In *Z.J. Gifts*, this Court resolved the split among the circuits with regard to whether the phrase "prompt judicial review" as set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), required a prompt judicial determination of a license denial or only prompt access to the courts. *Z.J.Gifts*, 541 U.S. at 781-84. In *Deja Vu I*, the Sixth Circuit reiterated that it was in the "determination" camp. *Deja Vu I*, 274 F.3d at 400 ("the licensing scheme 'must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possible erroneous denial of a license' "), *quoting Freedman*, 380 U.S. at 59.

The primary decision in *Z.J. Gifts* is in accord with this ruling, where this Court held that its previous reference to "prompt judicial review" required a "prompt judicial *decision*." *Z.J. Gifts*, 541 U.S. at 781 (emphasis added). In fact, this Court went on to note that "we reject the city's argument to the contrary." *Id.*

Consequently, the substantive ruling in *Deja Vu I* in regard to how the phrase "prompt judicial review" is to be operationalized is in *direct accord* with this Court's holding

in *Z.J. Gifts*. More importantly, however, this Court's decision in *Z.J. Gifts* does not address in the least the basis for the Sixth Circuit's judicial review ruling in *Deja Vu I*; that being that Chapter 6.54 failed to satisfy *Freedman* because the *availability* of judicial review was not guaranteed. Rather, Chapter 6.54, and Tennessee law, provided for judicial review only by way of a *discretionary* common law writ of certiorari. *Deja Vu I*, 274 F.3d at 401. Respectfully, this Court in *Z.J. Gifts* never addressed the question of whether a *discretionary* judicial review process would satisfy *Freedman*. Consequently, this portion of the Sixth Circuit's ruling is undisturbed by the ruling in *Z.J. Gifts*.

In fact, the Ninth Circuit recently addressed this distinction when it considered, *post Z.J. Gifts*, an ordinance where licensing decisions could be appealed not only by a special action, but also by a "regular lawsuit seeking an injunction against the enforcement of the ordinance after a contested license denial. . . . " *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1007 (9th Cir. 2004). The Ninth Circuit observed:

> The fact that a denied applicant can seek review other than through a discretionary writ distinguishes this case from *Deja Vu [I]*. . . . In *Deja Vu*, the Sixth Circuit held that a licensing ordinance that *required* an applicant to seek judicial review, if at all, via a *discretionary* writ unconstitutionally failed to guarantee a final judicial adjudication on the merits.

Dream Palace, 384 F.3d at 1007, n.10 (emphasis and clarification added, citation omitted). And it is therefore not insignificant that this Court denied Metro's petition

regarding the discretionary judicial review process at issue here.

Metro also argues that *Z.J. Gifts* is further applicable because Chapter 6.54 contains – it asserts similar to the Colorado ordinance analyzed by this Court – "reasonably objective, nondiscretionary criteria" upon which licensing decisions are to be made. Petition, pp. 21-22, *citing Z.J. Gifts*, 541 U.S. at 783. There are, however, two problems with this argument. First, under the Petitioner's contention, this Court would have to remand to the district court for it to make a determination, *in an attorney fee dispute*, of whether Chapter 6.54 indeed contained "reasonable objective, nondiscretionary criteria"; an issue which the district court was never required to directly address in the "merits" portion of this lawsuit.[3] Second, the record below simply does not bear out Metro's conclusory assertion.

After the first preliminary injunction was lifted, adult businesses in Nashville were required to undergo the licensing process. The record demonstrates that applications were denied for such subjective, discretionary reasons as a business having "unclean couches, restroom walls and fixtures, and shower stalls"; not eliminating "all unnecessary items on the lower level"; not eliminating storage that may attract rodents and insects; not having "tight fitting lids or covers" on all garbage containers; and having floors that were not "thoroughly cleaned throughout the facility and common area."[4] App. 246-258.

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[3] *Cf.*, *Hensley*, 461 U.S. at 437 ("A request for attorneys' fees should not result in a second major litigation").

[4] Of course, it should not be lost on this Court that *none* of these reasons are set forth in Chapter 6.54 as a ground to deny, suspend, or

(Continued on following page)

In addition, that the licensing criteria under Chapter 6.54 is neither objective nor nondiscretionary is directly demonstrated by the simple fact that the licensing board had numerous "split" votes on applications. For example, a motion to approve *Deja Vu's* license failed for the lack of a "second." A motion was then made to *deny* the application, which received two votes "for" and two "against." App. 266-269, 271. Similarly, *Ken's Gold Club* was granted a license on a two-to-one vote (App. 266), when it had previously been *denied* a license, also on a two-to-one vote. App. 262-264.

For all of these reasons, this Court's ruling in *Z.J. Gifts* does not abrogate the judicial review ruling of the Sixth Circuit in *Deja Vu I*. And, in any event, such a determination should not be made in a collateral attorney fee proceeding.[5] Consequently, the decision in *Z.J. Gifts* does not present "special circumstances" warranting the denial of attorney fees here.

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revoke a license. These actual proceedings of the Metropolitan "Sexually Oriented Business Licensing Board," however, aptly demonstrate the total unbridled discretion afforded to that board, which is permitted to deny licenses for any subjective, discretionary, reason whatsoever. At issue here is not, therefore, the "reasonably objective nondiscretionary criteria" that this Court reviewed in *Z.J. Gifts*.

[5] This is particularly true here where Metro attempts – improperly – to relitigate the correctness of the Sixth Circuit's decision in *Deja Vu I* (Petition, pp. 19-20), irrespective of this Court's denial of the Defendant's petition to directly review that ruling. In addition, Metro's arguments in this regard are erroneous because review through T.C.A. § 27-9-111(e) was still discretionary at the time the Sixth Circuit issued its opinion in *Deja Vu I*, notwithstanding the fact that a time limit was provided to resolve the judicial proceeding *if* the court decided to permit the appeal.

IV. THERE IS NO SUBSTANTIAL SPLIT IN THE CIRCUITS WARRANTING REVIEW BY THIS COURT.

A "court's discretion to deny a fee award to a prevailing plaintiff is narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980) (Title VII Fees). In support of its Petition, Metro asserts that there is a split among the circuits with regard to establishing when the narrow "special circumstance" may arise so as to justify denial of a fee award. In addition, the Petitioner argues that a plaintiff in a § 1983 claim should not be considered to be a "prevailing party" when a change in the law occurs after judgment and finality of appellate proceedings on the merits but before the conclusion of attorney fees proceedings.[6] Petition, pp. 13-16.

In regard to the latter contention, Metro correctly cites *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993), for the proposition that a decision of this Court announcing a new rule of federal law is to be "given full retroactive effect in all cases *still open on direct review*. . . ." (emphasis added). Certainly, this case was no longer on "direct review" when, on May 13, 2002, this Court denied Metro's petition for a writ of certiorari with regard to the Sixth Circuit "merits" ruling in *Deja Vu I*. Nevertheless, the Petitioner would have this Court take this case to announce a new rule of law holding that *Harper* should apply "to a case wherein there has already been a final order on the merits but attorney's fees are still

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[6] Petitioner's argument assumes, of course, that *Z.J. Gifts* invalidates the basis of the judicial review ruling of the Sixth Circuit in *Deja Vu I*, which Plaintiffs assert is not the case for the reasons set forth in Section III, *supra*.

at issue." Petition, p. 12. However, there is no split among the circuits on *this particular issue* (indeed, Petitioner has not claimed one to exist), and the only appellate decision which Metro cites for this proposition, *New York State Nat'l Org. for Women v. Terry*, 159 F.3d 86 (2nd Cir. 1998), actually comes to the *opposite* conclusion.

In *Terry*, the district court had entered a "merits" ruling, the Court of Appeals had affirmed it, and this Court had ultimately denied a petition for a writ of certiorari. *Id.* at 96 n.6. These are basically the facts here. In responding to a contention that the plaintiffs in that action were no longer prevailing parties because of this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119 (1991), which was released while the *Terry* attorney fee award was still on appeal, the Second Circuit observed:

> It is true the award of attorney's fees was on direct review when *Bray* was decided, and therefore is subject to the retroactive application of any new rule of law announced therein. . . . *Bray*, however, did not announce a new rule of law with respect to awards of § 1988 attorney's fees. Its new rule related to entitlement to prevail under § 1985(3).

Terry, 159 F.3d at 97.

More specifically, the Second Circuit stated that the intervening decision of *Bray* did not affect the district court's grant of judgment for the plaintiffs there because that holding "had become final before *Bray* was decided. . . . " *Terry*, 159 F.3d at 96. Accordingly, the appellate court concluded that the "merits" judgment in plaintiffs'

favor "was not on direct review" in the later proceedings, *id.*, and noted:

> Because plaintiffs were prevailing parties under § 1985(3), they were entitled to an award of attorney's fees under § 1988. This was not affected by the fact that, after the *judgment* in their favor under § 1985(3) *became final*,[7] new law declared by the Supreme Court would have made them ineligible for a new judgment under § 1985(3).

Id. (emphasis added). Accordingly, not even *Terry* supports adoption by this Court of the "new rule" suggested by the Petitioner.[8]

Moreover, while the Petitioner implies that this Court has not provided direction in regard to when "special circumstances" may be found to justify the denial of an attorney fee award, that is not, however, the case. For

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[7] A judgment "becomes final" when the availability of appeal has been exhausted or has lapsed, and the time to petition for certiorari has passed. *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 n.14 (1974), *citing Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965). In *Terry*, the Second Circuit noted that when "a writ of certiorari is denied, the judgment below stands under the doctrine of res judicata 'even if a new theory of law [is] thought up,'" and that "res judicata consequences are not 'altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.'" *Terry*, 159 F.3d at 96 n.6, *quoting Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring); and *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

[8] At best, the Second Circuit in *Terry* noted that the subsequent ruling in *Bray "might"* make the attorney fee award unjust, but found that not to be the case in the particular circumstances there. 159 F.3d at 97. Here, it is far from clear that *Z.J. Gifts* even invalidates the underlying basis of the judicial review decision of the Sixth Circuit in *Deja Vu I*. *See Deja Vu II*, 421 F.3d at 422 (*Z.J. Gifts* did not foreclose the result reached "in this case under very different circumstances").

example, in *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court concluded that although the award of nominal damages made that plaintiff a "prevailing party" eligible to receive attorney fees under 42 U.S.C. § 1988, the circumstances there – a demand of Seventeen Million Dollars yet an award of only One Dollar – did not justify the entitlement to fees. In reviewing virtually the entire body of case law which this Court had issued then-to-date, this Court observed that the *entitlement* to fees was inexorably intertwined with the determination of the *amount* of fees to be awarded, which in turn generally depended upon the degree of success in litigation. *Id.* at 109-116.

In citing to *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), for the proposition that a "technical victory may be so insignificant . . . as to be insufficient to support prevailing party status" (*Farrar*, 506 U.S. at 113, *citing Garland*, 489 U.S. at 792), this Court concluded that when a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the "only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115. *See also id.* at 118 (O'Connor, J., concurring) (noting that the "special circumstances" exception, while often articulated separately from a reasonableness inquiry, sometimes "is bound up with reasonableness: It serves as a shorthand way of saying that, even before calculating a loadstar or wading through all the reasonableness factors, it is clear that the reasonable fee is no fee at all"); *Hewitt v. Helms*, 482 U.S. 755 (1987) (The plaintiff there had obtained "no relief" by way of a revision of prison regulations which were enacted *after* he was released from incarceration, and was therefore not entitled to an award of attorney fees); *Rhodes v. Stewart*, 488 U.S. 1 (1988)

(Plaintiff not entitled to an award of attorney fees under 42 U.S.C. § 1988 when the case was moot before original judgment was issued because one plaintiff/inmate had died and the other had been released from custody, and the judgment therefore afforded the plaintiffs no relief).

What these cases make clear is that the focus is still, and always has been, on the degree of success obtained by the Plaintiff. Here, the entire Ordinance which these Plaintiffs challenged was enjoined, first preliminarily but then permanently, for over seven years. Under all of the existing precedent of this Court, no special circumstances justify the denial of an attorney fee award in these circumstances.

Nor is there any significant split in the circuits as suggested by the Petitioner.

First, with the exception of the fees awarded in this particular case, the Petitioner does not contend that in any of the decisions which it cites for this perceived "circuit split," the appellate courts had come to the wrong conclusion in regard to whether or not special circumstances existed. Second, the mere fact that the First Circuit in *Stefan v. Laurenitis*, 889 F.2d 363, 371 (1st Cir. 1989), the Fourth Circuit in *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260 (4th Cir. 1998), and the Sixth Circuit in *Wikol v. Birmingham Pub. Schls. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004), do not adopt, *verbatim*, the Ninth Circuit two-part test does not mean that they are applying standards that are in any significant way different, or that the

decisions in the other circuits would have reached different results if they had utilized the Ninth Circuit standards.[9]

For example, in *finding* "special circumstances" to exist so as to preclude an award of fees for services performed by an attorney-parent who represented his or her child in an Individuals with Disabilities Education Act proceeding, the Fourth Circuit in *Doe* relied (*Doe*, 165 F.3d at 261-65) upon the very similar facts in the ruling of this Court in *Kay v. Ehrler*, 499 U.S. 432, 438 (1991) (holding that a *pro se* plaintiff who is an attorney is not entitled to be awarded attorney's fees under 42 U.S.C. § 1988(b), because the statutory policy of "furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel *in every such case*"[10]) (emphasis added). Accordingly, the Fourth Circuit, similar to the Ninth Circuit, utilizes reference to the

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[9] The Fourth Circuit correctly observes that the Ninth Circuit test does not provide any "legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes." *Doe*, 165 F.3d at 264 n.2.

[10] In *Kay*, this Court noted that although § 1988 was in no doubt intended to encourage litigation protecting civil rights, "it is also true that its more specific purpose was to *enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights*." 499 U.S. at 436 (emphasis added). *See also S.Rep. No. 94-1011 at 2 (1976) as reprinted in 1976 U.S.C.C.A.N., 5908, 5910.* (". . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it cost them to vindicate these rights in court."). These purposes are clearly furthered by the award here.

congressional intent underlying the fee-shifting statutes in order to determine whether special circumstances exist.[11]

Even the approach of the Ninth Circuit, which Petitioner apparently contends is the correct interpretation (*see* Petition, p. 14 – *but see* n.9, *supra*), demonstrates that special circumstances are not present here. In *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), the court noted that the "congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law." *Id.* at 1348, *citing S. Rep. No. 94-1011 (1976) reprinted in 1976 U.S.C.C.A.N. 5908, 5910; H.R. Rep. No. 1558, 94th Cong., 2d Sess., (1976)*. Based upon this, the Ninth Circuit concluded that the district court had erred in depriving a school district of an award of attorney fees merely because it was a public-funded entity. *Seattle Sch. Dist.*, 633 F.2d at 1348. Here, constitutional rights were clearly vindicated, and in light of the over *two hundred thirty-five amendments* to Chapter 6.54 which were enacted during the course of this litigation, the threat of *additional* fees has certainly "stimulate[d] voluntary compliance with the law."

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[11] Petitioner's reliance upon *Raishevich v. Foster*, 247 F.3d 337 (2nd Cir. 2001), to establish a "split" among the circuits is unavailing for the reason that the particular test used by the Second Circuit there dealt specifically with the unique question of whether plaintiffs counsel's entitlement to a contingency fee award on a damage claim would vitiate the underlying purpose of providing an attorney fee award pursuant to 42 U.S.C. § 1988. *Id.* at 344-46. Here, none of the attorneys were retained pursuant to a contingency fee agreement, and there was no damage award entered by the district court.

The phrase "special circumstances" certainly refers to unique situations which, by definition, cannot be universally described in advance by any monolithic rule of law. Further elaboration by this Court is not then necessary.

CONCLUSION

For the reasons as are set forth herein, Plaintiffs/Respondents respectfully request this Honorable Court deny the petition for a writ of certiorari.

Dated: May 19, 2006

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION*

DEJA VU OF NASHVILLE, INC., et al.	)	No. 3-97-1066
	)	Consolidated with
v.	)	No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	)	

ORDER

On October 28, 1998, a hearing was held upon the parties' request, at which time the following matters were addressed:

1. The deadline for the plaintiffs to respond to the defendants' pending motion (Docket Entry No. 34) to dissolve the preliminary injunction is extended to November 2, 1998. Such response shall be transmitted by personal delivery or facsimile to defendants' counsel by 11:00 a.m., C.S.T. (Nashville time).

2. Any reply to such response shall be filed by the defendants, if necessary, by November 4, 1998, and a copy transmitted by facsimile to plaintiffs' counsel.

3. The defendants announced that they agreed to extend the grace periods for the business plaintiffs and the individual plaintiffs to 120 days and 45 days, respectively,

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

from the date of entry of any order granting the defendants' pending motion to dissolve the preliminary injunction for such plaintiffs to make application for a license under the amended ordinance, and that none of the ordinance provisions will be effective against the plaintiffs nor will any action be taken against the plaintiffs for their non-compliance with the ordinance during the grace period as set forth above.

4. After the entry of any order granting the defendants' pending motion to dissolve the preliminary injunction, the plaintiffs shall have 10 working days to file a supplemental motion for preliminary injunction, in which all issues upon which the plaintiffs relies in this case shall be raised.[1] Although the parties and the Court had originally, by prior scheduling orders, contemplated that the plaintiffs' second motion(s) for preliminary injunction would be heard at the same time as the defendants' motion to dissolve the injunction, after further consideration, it appears that it would be more efficient to delay consideration of any second motion for preliminary injunction until after the resolution of the defendants' pending motion to dissolve the preliminary injunction.[2]

5. The deadline for filing all dispositive motions (except motions for injunctive relief) shall be extended, and an extended deadline determined after the resolution of the defendants' motion to dissolve the preliminary injunction, if denied, or after the plaintiffs' anticipated

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[1] In other words, the plaintiffs shall not piecemeal motions for preliminary injunction but shall raise all grounds in support of a motion for preliminary injunction at one time.

[2] Specifically, if the Court were to deny the motion to dissolve, there would be no need for a second motion for preliminary injunction.

second motion for preliminary injunction, if the motion to dissolve is granted.

6. As a result of the agreement reached among the parties, the plaintiffs' motion to continue (Docket Entry No. 57) the hearing scheduled for November 5, 1998, was WITHDRAWN, and the Clerk is directed to terminate that motion.

7. As a result of the scheduling matters addressed above, the defendants WITHDREW their motion to grant the defendants' motion to dissolve based on the plaintiffs' failure to file a response or to clarify the scope (Docket Entry No. 59), and the Clerk is directed to terminate that motion as pending.

8. Plaintiffs' counsel shall call the office of the undersigned within five (5) days of the resolution of the pending motion to dissolve the injunction[3] and, if the motion is granted, within five (5) days of the resolution of the plaintiffs' anticipated second motion for preliminary injunction.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

[3] If the motion is denied, further proceedings will be scheduled, and deadlines established for filing dispositive motions. If the motion is granted, specific deadlines for the plaintiffs to file a supplemental motion for preliminary injunction and for briefing on such motion will be established.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	]
v.	] No. 3-97-1066
	] No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	] Judge Higgins

ORDER

(Filed May 26, 2000)

The defendants' motion[1] (filed May 5, 2000; Docket Entry No. 224) to vacate or dissolve injunction under Rule 60(b) is denied because the Court is without jurisdiction in view of the filing of a notice of appeal.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
5-23-00

[1] *See also* the defendants' memorandum (Docket Entry No. 225) in support of the motion and plaintiffs' response (Docket Entry No. 226) in opposition to the motion.

No. 00-5881

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., doing business as Ken's Gold Club, a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS; THE 822 CORPORATION; 421 CORPORATION,

Plaintiffs-Appellees,

CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation,

Plaintiff,

v

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metropolitan Police Department,

Defendants-Appellants

ORDER

(Filed Oct. 4, 2000)

Before: MARTIN, Chief Judge, WELLFORD and SUHRHEINRICH, Circuit Judges.

The defendants appeal the district court's order denying their motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) They now move this court for a limited remand to the district court for consideration of the Rule 60(b) motion on the merits Alternatively, the defendants move for consolidation of this appeal with three others that are pending before the court. The plaintiffs oppose a remand but concur in the request for consolidation.

The three related appeals, Case Nos. 99-5701 and 00-5284/5288, are nearly ready for submission to the court. Further, there appear to be issues within those appeals that remain for this court's disposition. Under these circumstances, the appeals shall proceed at this time.

The defendants' motion is **DENIED** insofar as it seeks a remand to the district court and **GRANTED** insofar as it seeks consolidation of this appeal with Nos. 99-5071 and 00-5284/5288.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/sr
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., A TENNESSEE CORPORATION, ET AL.,

Plaintiffs-Appellants,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL.,

Defendants-Appellees.

ORDER

(Filed Feb. 5, 2002)

BEFORE: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions or rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ **Leonard Green**
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	
v.	NO. 3:97-1066
METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY	JUDGE CAMPBELL CONSOLIDATED CASES

ORDER

(Entered April 27, 2005)

Pending before the Court is a Motion to Dissolve the Injunction (Docket No. 294), filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed a Response (Docket No. 305) in opposition.

Metro's Motion is GRANTED, and the injunction previously entered in this case (Docket No. 199) is dissolved.

Pursuant to request from Metro, the effective date of this Order shall be August 1, 2005, in order to allow sexually oriented businesses and entertainers sufficient time to comply with the requirements of Chapter 6.54 of the Metropolitan Code of Laws.

All matters having been ruled upon, the case is dismissed and the Clerk is directed to close the file.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	
v.	)	NO. 3:97-1066
METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY	)	JUDGE CAMPBELL CONSOLIDATED CASES

MEMORANDUM

(Entered April 27, 2005)

Pending before the Court is a Motion to Dissolve Injunction (Docket No. 294), filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed a Response (Docket No. 305) in opposition. For the reasons stated herein, the Motion is GRANTED.

Metro seeks to dissolve an injunction issued on December 23, 1999, enjoining enforcement of Chapter 6.54 of the Metropolitan Code of Laws. Docket No. 189. Metro has presented evidence that both the facts and the law have changed since entry of that injunction, justifying its dissolution.

The Order enjoining the ordinance at issue was appealed to the Sixth Circuit Court of Appeals, which, in a published opinion, affirmed it in part and reversed it in part. Relevant to the decision on Metro's Motion to Dissolve Injunction, the Sixth Circuit held: "Upon remand, the district court should maintain the injunction until

Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County, Tennessee,* 274 F.3d 377, 403 (6th Cir. 2001).[1] The issue before this Court is whether Metro has made a satisfactory showing in that regard. After remand from the Sixth Circuit, this case was reassigned to the undersigned District Judge by Order (Docket No. 251) entered on May 16, 2002.

DEFINITION OF "SEXUALLY ORIENTED"

With regard to the definition of "sexually oriented" found to be unconstitutional, Metro has presented evidence that the ordinance has been amended to eliminate the potential overbreath found to be unconstitutional by the Sixth Circuit. The current ordinance defines "sexually oriented" as follows:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

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[1] This dictate from the Sixth Circuit makes Plaintiffs' Rule 60 argument meritless.

Metro Code of Laws, § 6.54.010(Y) (attached to Docket No. 294 as Ex. A).

The Sixth Circuit found the former definition of "sexually oriented" to be overbroad because it could apply to a range of expression that does not cause the secondary effects that the ordinance was aimed to prevent. *Deja Vu*, 274 F.3d at 388. A law is overbroad under the First Amendment if it reaches a substantial number of impermissible applications relative to the law's legitimate sweep. *Id.* at 387.

This Court finds that the amended definition is not overbroad and complies with the First Amendment. It no longer applies to just *any* film, movie, motion picture, etc., but rather only to those which "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas' offered for observation by the patron(s) on the premises of a sexually oriented business."

The Court further finds that the amended definition has eliminated the potential for reaching a substantial number of impermissible applications by its restrictions that the subject media be "on the premises of a sexually oriented business," and "regularly depict" material with "an emphasis on" the specified sexual activities or specified anatomical areas defined elsewhere in the ordinance.

For these reasons, Metro has satisfied the Court that the constitutional problems with the ordinance's definition of "sexually oriented" have been corrected.[2]

JUDICIAL REVIEW PROCEDURES

As for the sufficiency of its judicial review procedures, Metro argues both that the judicial review procedures have been changed and that the law as to what is required has changed.

The Sixth Circuit found that the judicial review procedures in effect at the time of the injunction provided no assurance of prompt judicial review because there was no affirmative evidence showing that every writ of certiorari would be granted. *Deja Vu,* 274 F.3d at 402. The court held that because the ordinance's judicial review procedures did not guarantee prompt judicial review as required by the First Amendment, those procedures were facially[3] unconstitutional. *Id.* at 402-403.

The judicial review procedures provided by Tennessee law have since changed. The relevant statute now provides:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the

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[2] The Sixth Circuit also noted that the phrase "sexually oriented" is "never used but in conjunction with some other word that has its own definition" and is "apparently meaningless." *Deja Vu*, 274 F.3d at 389. Thus, "sexually oriented" can "easily be severed" in any event. *Id.*

[3] Plaintiffs' assertion that the constitutionality of the ordinance herein was decided on a case-by-case basis is wrong.

> respondent requests an expedited hearing, the court *shall immediately grant* the writ of certiorari, and *shall hear the matter and issue its decision* within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e) (emphasis added).

The Court finds that this amended, mandatory[4] language does guarantee prompt judicial review as required by the First Amendment. The statute is sufficient "affirmative evidence" that every writ of certiorari concerning protected speech will be granted. Accordingly, Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected.[5]

Even if the amended ordinance did not specifically guarantee prompt judicial review, which it does, Metro argues that it is sufficient to withstand constitutional muster under the recent case of *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 124 S.Ct. 2219 (2004). In that case, the Supreme Court held that Colorado's ordinary judicial review procedures suffice to protect First Amendment judicial review rights, so long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. *Id.* at 2224. Specifically, the Court stated "we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First

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[4] Plaintiffs' contention that the statute is discretionary has no merit.

[5] It is also clear that the statute was amended specifically to comply with the Sixth Circuit's opinion in this case, as reflected in 2002 Pub. Acts, c. 615, § 2 regarding the effective date.

Amendment harm. We presume that courts are aware of the constitutional need to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" *Id.* at 2225.[6]

In addition, the Supreme Court held that where the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria[7] and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision in the first place. *Id.* at 2226. The Court need not decide whether *Z.J. Gifts* dictates the result in this case, since the amended ordinance guarantees prompt judicial review.

For these reasons, the Court is satisfied that the previously-determined unconstitutional deficiencies in Metro's judicial review procedures in this case have been corrected, and that the amended statute provides the required First Amendment protections. Metro's Motion to Dissolve the Injunction is GRANTED.

FURTHER LITIGATION

Plaintiffs argue that dissolution of the injunction should not end this litigation because the injunction hearing was never consolidated with a trial on the merits.

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[6] "Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require." *Z.J. Gifts* at 2226. Metro argues the same presumption should be afforded Tennessee's rules and courts.

[7] The Court does not use the words "objective" or "subjective" as suggested by the Plaintiffs.

Judge Higgins' Order of December 23, 1999, provides otherwise. That Order states:

> In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.
>
> The preliminary injunction heretofore issued is herewith made a permanent injunction.
>
> . . .
>
> The entry of this order shall constitute the final judgment in this action.

Docket No.199.

In addition, as Metro points out, Magistrate Griffin specifically ordered the Plaintiffs to file (within ten days of any order granting Defendants' prior Motion to Dissolve Preliminary Injunction) a supplemental motion for preliminary injunction, "in which all issues upon which the plaintiffs relies (sic) in this case shall be raised. In other words, the plaintiffs shall not piecemeal motions for preliminary injunction but shall raise all grounds in support of a motion for preliminary injunction at one time." Docket No. 61. That "supplemental" motion (Docket No. 83) was granted by Judge Higgins (Docket No. 188), appealed to the Sixth Circuit (Docket No. 208), affirmed in part and reversed in part (274 F.3d. 377), and is the subject of the pending Motion to Dissolve Injunction. All issues upon which the Plaintiffs rely in this case should

have been raised.[8] Indeed, the Sixth Circuit found that Plaintiffs raised "all of their constitutional challenges to the Ordinance." *Deja Vu*, 274 F.3d at 386.[9]

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[8] The Court cannot and will not revisit other substantive rulings previously made herein.

[9] Plaintiffs also argue there is a pending Motion for Review of the Magistrate Judge's Order. The only pending motion in this case is this Motion to Dissolve the Injunction. All other motions were termed when the judgment was made final (Docket No. 199) and appealed.

To the extent Plaintiffs seek to raise new matters arising after the Sixth Circuit's opinion, or related to new ordinance provisions, they should file a new case.

Plaintiffs also argue that various state constitutional issues are pending. The Court disagrees for the reasons stated above, but in any event declines supplemental jurisdiction over any state law claims. 28 U.S.C. § 1367(c).

42 U.S.C. § 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

T.C.A. § 27-8-101. Constitutional basis. – The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. [Code 1858, § 3123 (deriv. Const. 1834, art. 6, § 10); Shan., § 4853; Code 1932, § 8989; T.C.A. (orig. ed.), § 27-801.]

T.C.A. § 27-9-111 (2002). Hearings; findings

(a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The judge shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof.

(e) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari. When an expedited hearing is requested, the board or commission shall forward the transcript described in § 27-9-109 within seven (7) days of the grant of the writ of certiorari.

1951 Pub.Acts, c. 261, § 1; 1987 Pub.Acts, c. 28, §§ 1 to 3; 1998 Pub.Acts, c. 794, § 1, eff. April 23, 1998. Amended by 2002 Pub.Acts, c. 615, § 1.

Formerly 1932 Code, § 9014; § 27-911.

HISTORICAL AND STATUTORY NOTES

2002 Pub.Acts, c. 615, § 1, deleted the first sentence of subsec. (e), which formerly read: "If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution if the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari" and replaced it with the language "If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari."

2002 Pub.Acts, c. 615, § 2, provides:

"This act shall not take effect until such time as the United States Supreme Court has denied the petition for a writ of certiorari filed by the Metropolitan Government of Nashville and Davidson County in the case of Deja vu, Inc. v Metropolitan Government, 274 F.3d 377 (6th Cir. 2001), or if the United States Supreme Court grants a writ of certiorari, this act shall not take effect until such time as the United States Supreme Court affirms the Sixth Circuit's opinion on the issue of 'prompt judicial review.' If the United States Supreme Court reverses the Sixth Circuit's opinion on 'prompt judicial review' this act shall never take effect."

BILL NO. O97-796

AN ORDINANCE AMENDING TITLE 6 OF THE METROPOLITAN CODE OF LAWS BY ADDING A NEW CHAPTER 6.54, LICENSING AND REGULATION OF ADULT ENTERTAINMENT AND ADULT BUSINESSES.

WHEREAS, the Metropolitan County Council of the Metropolitan Government of Nashville and Davidson County ("Metropolitan Council") may, pursuant to Section 2.01(40) of its Charter and the general laws of the State of Tennessee, enact regulatory ordinances protecting and promoting the general welfare, health, and safety of its citizens; and,

WHEREAS, the Metropolitan Council has previously enacted Sections 17.12.080(29), 17.60.020(C)(1), and 17.64.270 of the MCL which regulate the location of sexually oriented businesses; and,

WHEREAS, since the adoption of the above-referenced ordinances, the Metropolitan Council has received and considered reports and recommendations from employees, citizens, other local governments, and other reputable sources and has determined that locational criteria alone do not adequately protect the health and general welfare of the people of Metropolitan Nashville Davidson County, and,

WHEREAS, the Metropolitan Council has determined that permitting and/or licensing is a legitimate and reasonable means of accountability to ensure that operators of adult entertainment establishments comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places for illegal sexual activity or solicitation; and,

WHEREAS, it is not the Intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the secondary effects of adult entertainment establishments; and,

WHEREAS, it is not the intent of the Metropolitan Council to condone or legitimize the distribution of obscene materials, and the Metropolitan Council recognizes that state and federal law prohibits the distribution of obscene materials and expects and encourages state and federal enforcement officials to enforce state and federal obscenity statutes against any such illegal activities in Metropolitan Davidson County; and,

WHEREAS, the locational requirements of the Adult Entertainment Zoning Ordinance are unaffected by the following amendment.

WHEREAS, the Metropolitan Council desires to amend the Code of Laws of the Metropolitan Government of Nashville and Davidson County ("MCL") to regulate adult entertainment establishments in order to promote and secure the general welfare, health, and safety of the citizens of Metropolitan Nashville and Davidson County.

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY.

SECTION 1. Purpose and Findings.

(A.) *PURPOSE.* It is the purpose of this ordinance to regulate adult entertainment establishments to promote the health, safety, morals, and general welfare of the citizens of Metropolitan Nashville Davidson County. The provisions of this ordinance have neither the purpose nor

effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials or entertainment. Similarly, it is not the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented materials or entertainment to their intended market.

(B.) *FINDINGS*. Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and reports made available to the Metropolitan Council, and on findings incorporated in the *DLS d/b/a Diamonds and Lace Showbar v. The City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *DLS, Inc d/b/a Diamonds and Lace Showbar v. City of Chattanooga*, 914 F.Supp. 193 (E.D. Tenn. 1995); *DLS, Inc d/b/a Diamonds and Lace Showbar v City of Chattanooga*, 894 F.Supp. 1140 (E.D. Tenn. 1995); *City of Renton v. Playtime Theaters. Inc.*, 475 U.S. 41 (1986); *Coleman A. Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976); and studies and judicial opinions concerning the adverse secondary effects of adult uses on communities such as Austin, Amarillo, and Beaumont, Texas; Phoenix and Tucson, Arizona; Minnesota [see Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989)], Seattle, Washington; [*see Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978)]; and Houston, Texas; [see *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); as well as newspaper articles [*see Peep Shows Role Unregulated* (*Tennessean*, April 8, 1991)] reports from the Police Department and reports from the Department of Health of

the Metropolitan Government of Nashville and Davidson County, the Metropolitan Council finds:

1. Unlawful and unhealthy activities that are occurring within adult entertainment establishments are presently uncontrolled by the operators of these establishments and, there is presently no mechanism to control the unhealthy and unlawful activities that are occurring within these establishments or to make the owners and operators of these establishments responsible for the activities that occur on their premises.

2. Certain employees of adult entertainment establishments in Davidson County engage in a higher incidence of certain types sexually oriented criminal activity, unhealthy and illegal sexual contact, and other unlawful activities at these businesses than employees of other establishments

3 Sexual acts, including homosexual and heterosexual masturbatory acts and oral and anal sex acts, are a regular occurrence at adult entertainment establishments in Davidson County, especially those establishments where there are private or semi-private booths or cubicles for viewing films, videos, or live sex shows.

4. Offering and providing such space, areas and rooms where such activities take place creates conditions that generate prostitution and other crimes, as well as unhealthy conditions.

5. Persons frequent certain adult theaters, adult bookstores, and adult video stores for the purpose of providing sex within the premises of such adult theaters, adult bookstores, and adult video stores and patrons frequent certain adult theaters, adult bookstores, adult

nightclubs, and adult video stores for the purpose of procuring prostitutes.

6. At least fifty communicable diseases may be spread by activities currently occurring in adult entertainment establishments, including, but not limited to, syphilis, gonorrhea, human immuno-deficiency virus infection (HIV), genital herpes, hepatitis B, hepatitis Non A, hepatitis Non B, amebiasis, and shigella infections.

7. Since 1981 and to the present, there have been an increasing cumulative number of reported cases of acquired immuno-deficiency syndrome (AIDS) caused by the human immuno-deficiency virus (HIV) in the United States –

600 cases in 1982	8,555 in 1985	68,959 in 1994
2,200 in 1983	336,522 between	61,614 in 1995
4,600 in 1984	1986 and 1992	and 36,693 cases
	77,641 in 1993	in 1996;

and in Tennessee –

3 cases in 1982	345 in 1987	2,380 in 1992
7 in 1983	666 in 1988	1,308 in 1993
28 in 1984	1,012 in 1989	818 in 1994
70 in 1985	1,389 in 1990	1,018 in 1995
161 in 1986	1,820 in 1991	and 965 cases in 1996;

and in Davidson County –

187 cases in 1992	207 in 1995
308 in 1993	153 in 1996.
177 in 1994	

8. As of February 28, 1993, there have been 2,521 reported cases of AIDS in Tennessee, with 1,502 deaths being reported. Of those 2,521 cases, 2,340 were males and 181 were females.

9. The number of cases of early syphilis in the United States has risen with

33,613 cases reported in 1982	27,883 in 1986
32,698 in 1983	35,147 in 1987
28,607 in 1984	40,117 in 1988
27,131 in 1985	44,540 in 1989
	45,200 in 1990

10. The number of cases of early syphilis in Tennessee has grown with

1,150 in 1982	2,766 in 1989
1,013 in 1983	1,989 in 1990
1,014 in 1984	2,011 in 1991
1,168 in 1985	2,786 in 1992
1,160 in 1986	2572 in 1993
1,330 in 1987	2312 in 1994
1,910 in 1988	2,035 in 1995
	and 1,807 in 1996

and in Davidson County syphilis cases reported annually have risen with 101 cases in 1982 –

104 in 1983	130 in 1988	149 in 1993
86 in 1984	211 in 1989	100 in 1994
52 in 1985	515 in 1990	194 in 1995
87 in 1986	437 in 1991	292 in 1996
173 in 1987	388 in 1992	

11. The number of cases of gonorrhea in the United States reported annually remains at a high level, with 960,633 civilian cases reported in 1982 –

900,435 in 1983	780,905 in 1987
878,556 in 1984	719,536 in 1988
911,419 in 1985	733,151 in 1989
900,868 in 1986	and 611,932 through November 1990;

and in Tennessee –

32,444 in 1982	23,740 in 1987	15,197 in 1994
30,896 in 1983	19,336 in 1988	13,894 in 1995
30,749 in 1984	19,557 in 1989	11,710 in 1996
32,110 in 1985	56,763 through	
26,455 in 1986	December 1992	
	14,285 in 1993	

12. The number of cases of gonorrhea reported annually in Davidson County remains at a high level, with –

5,325 in 1982	3,846 in 1987	2,390 in 1992
4,744 in 1983	3,815 in 1988	2,388 in 1993
5,294 in 1984	3,409 in 1989	3110 in 1994
5,202 in 1985	2,966 in 1990	2,622 in 1995
4,731 in 1986	2,701 in 1991	2,033 in 1996.

13. The Surgeon-General of the United States in his report of October 22, 1986, has advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug abuse, exposure to infected blood and blood components, and from an infected mother to her newborn.

14. According to the best scientific evidence, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts.

15. According to the best scientific evidence, numerous other diseases and infestations, including chlamydia, pelvic inflammatory disease, chancroid, herpes, hepatitis B, lympho-granuloma venereum, granuloma inguinale, genital warts, trichomomasis, scabies, pediculosis, amebiasis, giardiasis, and others are transmitted by sexual acts.

16. Conditions in some adult entertainment establishments are unsanitary and unhealthy, in part, because

the activities conducted there are unhealthy, and in part, because the owners and operators of the facilities fail to regulate the unhealthy and unsanitary activities and fail to maintain the facilities in a sanitary and healthy condition.

17. The United States Center for Disease Control has issued universal precautions, including housekeeping and disinfection guidelines, for the prevention of transmission of the HIV virus and other diseases. These guidelines should be followed anytime there is the potential for exposure to blood and other body fluids.

18. Staff members of the police and health departments have observed semen, blood, fecal matter and urine within the public areas of adult entertainment establishments in Davidson County. These unhealthy conditions are worse in areas within adult entertainment establishments where persons view sexually oriented films, sexually oriented movies, adult videos or witness sexually oriented live entertainment.

19 Permitting entertainers to be in close contact with patrons initiates the exchange of money which may reasonably be expected to serve as an opportunity to solicit for and an inducement to agree to unprotected and/or illegal sexual activity, including prostitution and thus poses a threat to both groups by promoting the spread of communicable diseases, and encouraging crime.

20. When the previously described activities characteristic of adult entertainment establishments are present within Davidson County, Tennessee, other activities which are illegal or unhealthy tend to accompany them, concentrate around them and be aggravated by them. Such other activities include, but are not limited to, prostitution,

pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful materials and possession, distribution and transportation of obscene materials.

21. The findings noted in paragraphs 1 through 20 raise substantial governmental concerns.

22. Adult entertainment establishments should be reasonably regulated in order to protect those substantial governmental concerns.

23. A reasonable licensure procedure is an appropriate and effective mechanism to place the burden of that reasonable regulation on the owners and operators of adult entertainment establishments. Further, such a licensing procedure will place a heretofore nonexistent incentive on the operator to see that the adult entertainment establishment is run in a manner that is consistent with the health, safety and welfare of its patrons and employees, as well as the citizens of Davidson County, Tennessee. It is appropriate to require reasonable assurances that the licensee is the actual operator of the adult entertainment establishments, fully in possession and control of the premises and the activities occurring therein.

24. Removal of doors on booths – wherein patrons view sexually oriented movies, sexually oriented films, adult videos, or sexually oriented live entertainment – and requiring sufficient lighting in premises with booths advances the substantial governmental interest of curbing the illegal and unsanitary sexual activity occurring at adult entertainment establishments

25 The prevention of sexual contact between patrons and employees at adult entertainment establishments is unrelated to the suppression of free expression, but serves to address the concerns raised in the findings contained herein.

26. Prohibiting dancers and patrons from engaging in sexual fondling and caressing in adult theaters or adult cabarets would reduce the opportunity for prostitution and thus should deter prostitution and other crimes of a sexual nature.

27. The disclosure of certain information by those persons ultimately responsible for the day-to-day operation and maintenance of an adult entertainment establishment is substantially related to the significant governmental interest of preventing the spread of sexually-transmitted diseases and reducing or eliminating the criminal activity associated with adult entertainment establishments.

28 It is desirable in the prevention of the spread of communicable diseases and in the investigation of criminal activity, to obtain a limited amount of information regarding certain operators and employees who either engage in the conduct which this ordinance is designed to prevent or are likely to be witnesses to such activity.

29. A substantial rational relationship between adult entertainment establishments and sexually related crimes establishes a compelling justification for barring those persons who have committed crimes from the management of such businesses.

30 The fact that an applicant for an adult use license has been convicted of a sexually-related crime leads to a

rational inference that the applicant is more likely to engage in conduct in contravention of this ordinance.

31. The barring of such individuals from management of adult uses for a period of years serves as a deterrent to and prevents the conduct which leads to the transmission of sexually transmitted diseases and to the promotion of that criminal activity associated with adult uses.

32. The general welfare, health, and safety of the citizens of Metropolitan Nashville and Davidson County will be promoted by the enactment of this ordinance.

SECTION 2: Title 6 of the Code of Laws of The Metropolitan Government of Nashville and Davidson County is amended by adding a new Chapter 6.54.

6.54 Licensing and Regulation of Adult Business:

6.54.010 Definitions.

A. Definitions

For the purpose of this chapter, the words and phrases used herein shall have the following meanings, unless otherwise clearly indicated by the context:

1. *Adult entertainment* means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein.

2. *Adult entertainment establishment* means any commercial establishment – including but

not limited to: "adult bookstore", "adult video store", "adult theater", "adult nightclub", sexual encounter center, massage parlor, rap parlor, lingerie modeling, or sauna – which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matters depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein. Adult entertainment establishment further means any commercial establishment to which the public patrons or members are invited or admitted and which are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing sexually oriented motion pictures, sexually-oriented movies, sexually oriented films, adult videos, or wherein an entertainer provides sexually oriented entertainment to a member of the public, a patron or a member.

(a) *Adult bookstore* means an establishment having any of its stock and trade in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation of the patrons therein, or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, adult videos, sexual y oriented films, or sexually oriented live entertainment, for observation by patrons therein.

(b) *Sexually oriented* means any exhibition of any motion pictures, films, videos, or live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers which has a significant or substantial portion of such performance any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas".

(c) *Adult theater* means an enclosed building regularly used for presenting films, motion pictures, video cassettes, slides, or other photographic reproductions or other material depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below, for observation by patrons therein.

(d) *Adult nightclub* means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined below.

(e) *Adult video store* means a commercial establishment having any stock in "adult videos" – as defined below – which are rented or sold and presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "adult videos", or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical

areas" as defined below for observation by patrons therein.

(f) *Adult videos* means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

3. *Aggravated rape* as defined in The Tennessee Code Annotated § 39-15-502.

4. *Aggravated sexual battery* as defined in The Tennessee Code Annotated § 39-15-504.

5 *Employee* means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of an adult entertainment establishment.

6 *Entertainer* means any person who provides live entertainment within an adult entertainment establishment as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

7. *Indecent exposure* as defined in The Tennessee Code Annotated § 39-15-511.

8. *Location* means a single site for which only one use and occupancy permit would be required

9 *The Metropolitan Area* – General services district of the Metropolitan Government of Nashville and Davidson County

10. *The Metropolitan Council* means the legislative body of The Metropolitan Government of Nashville and Davidson County, Tennessee

11. *Obscenity* as defined in The Tennessee Code Annotated § 39-17-901(10) through (14).

12. *Operator* means any person, partnership, or corporation operating, conducting or maintaining an adult entertainment establishment.

13. *Prostitution* as defined in The Tennessee Code Annotated § 39-13-512

14. *Patronizing prostitution* as defined in The Tennessee Code Annotated § 39-15-13-512.

15 *Promoting prostitution* as defined in The Tennessee Code Annotated § 39-15-13-512.

16 *Rape* as defined in The Tennessee Code Annotated § 39-15-503.

17. *Rape of a child* as defined in The Tennessee Code Annotated § 39-15-522

18. *Sexual battery* as defined in The Tennessee Code Annotated § 39-15-505.

19. *Sexual exploitation of a minor* as defined in The Tennessee Code Annotated § 39-17-1003, § 39-17-1004, and § 39-17-1005.

20. *Specified sexual activities* mean

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

21. *Specified anatomical areas* mean:

(a) Less than completely and opaquely covered:

(i) Human genitals, pubic region,

(ii) Buttocks;

(iii) Female breasts below a point immediately above the top of the areola; and

(b) Human male genitals in a discernibly turgid state, even if completely opaquely covered

22. *Statutory rape* as defined to The Tennessee Code Annotated § 39-15-506.

6.54.020 Adult Entertainment Licensing Board

A. Establishment

An adult entertainment licensing board is hereby created and designated the metropolitan adult entertainment licensing board (herein "board").

B. Membership – Terms

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the un-expired term

C. Election of officers – Term

The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen.

D. Meetings – Quorum required – Minutes and transcript

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4 No transcript of the proceedings had before the board shall be in any form other than narrative

unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all adult entertainment establishments as provided herein, located in the metropolitan area.

2 The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the metropolitan charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board

F. Inspectors – Authority.

The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G Procedures for Hearings

This section shall apply to all hearings by the board including but not limited to hearings for revocation suspension, or denial of a license/permit.

1 Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair Any decisions of the board to deny a renewal, suspend, or revoke a license/permit shall not take effect earlier than ten (10) days after the date the decision was rendered to allow the effected party adequate time to seek judicial review.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5 A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. Any party desiring a court reporter to be present at the hearing must arrange for the court reporter to be present.

6.54.030 License Required.

A Except as provided in subsection F below, from and after the effective date of this ordinance, no adult entertainment establishment shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership, or corporation which desires to operate more than one (1) adult entertainment establishment must have a license for each establishment

C. Only one license nay be issued for each adult entertainment establishment location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It shall be unlawful for any entertainer or operator to work in or about, or to perform any service directly related to the operation of any unlicensed adult entertainment establishment. It shall be unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed adult entertainment establishment while adult entertainment is being presented.

F All existing adult entertainment establishments at the time of the passage of this ordinance must submit an application for a license within one hundred twenty (120) days of the effective date of this ordinance. If a license is not applied for within said one-hundred-twenty day period, then such existing adult entertainment establishment shall cease operations.

6.54.040 Application for license.

A. Application

1. Any person, partnership, corporation or any other entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be

distributed promptly by the board to: the police department, the department of codes administration, the health department, the fire department, and to the applicant.

2 Application forms shall be available at the office of the board

3 The application form shall include all the information indicated in subsection 6.54.040(5)(a) through (l).

4. The following persons must obtain a license: any partner of a partnership who will participate in the day to day operation of the business, any officer or director of a corporate applicant, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will participate in the day to day operation of the business.

5. The applicant shall furnish the following information under oath:

(a) Name and address, including all aliases (business address is sufficient);

(b) Proof that the individual is at least eighteen (18) years of age;

(c) All residential addresses of the applicant for the past three (3) years (for the purpose of facilitating the police investigation into the applicants criminal background);

(d) The business, occupation or employment of the applicant for five (5) years immediately preceding the date of the application (for the purpose of facilitating the police investigation into the applicants criminal background);

(e) Whether the applicant previously operated in this or any other county, city or state under an adult entertainment establishment license or similar business license. Whether the applicant has ever had such a license revoked or suspended, the reason therefore, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

(f) All violations, convictions, or any or pleas of *nolo contendere* to any crime of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crimes of a sexual nature, or any crime involving moral turpitude.

(g) All citations issued and sustained by a court within the past two years for violations of any provisions of the metropolitan zoning code applicable to adult entertainment establishments, including but not limited to sections 17.12.080(29), 17.60.020, 17.64.270.

(h) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant. (for the purpose of facilitating the police investigation into the applicants criminal background)

(i) The address of the adult entertainment establishment to be operated by the applicant.

(j) If the applicant is a corporation the application shall specify the name of the corporation the date and state of incorporation the name and address of the registered agent and the name and

address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day to day operation of the business.

(k) If the applicant is a partnership, joint venture, or any other type of business the application shall specify the name and address of all persons who will be involved in the day to day operation of the business

(l) A statement by the applicant that he/she is familiar with the provisions of this ordinance and is in compliance with them.

6 If the applicant intends to have booth, stalls, cubicles, or rooms on the premises for the purpose of viewing sexually oriented movies, sexually oriented films, or adult videos, or sexually oriented live exhibitions, then along with the application, the applicant shall provide the board with his/her application a diagram, drawn to scale, of the premises including but not limited to the location and layout of all booths, stalls, cubicles, or rooms and the location of the clerk/managers stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared

B. Inspections.

1. The police department, codes department, fire department, and health department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the metropolitan code including the applicable zoning ordinances, fire code statutes, ordinances and regulations, and the health code statutes, ordinances and regulations.

2. If a diagram is required to be submitted under 6.54.040(A)(6), then the code inspector shall confirm the layout of the booths, stalls, cubicles, or rooms complies with the submitted diagram and the requirements set out in 6.54.050(A)

3. The police department, codes department, fire department, and health department shall complete their respective inspections and shall communicate the results of their respective inspections to the board in writing within thirty (30) days of receipt of the application. The writing shall end with one of the following statements:

The location at _____
complies with the relevant and applicable code sections and applicable rules and regulations of the board.

The location at _____
does not comply with the relevant and applicable code sections or does not comply with the relevant and applicable rules and regulations of the board. It is in violation of the following provisions *Section numbers of code violations*

4. All ongoing businesses shall be inspected in accordance with 6.54.040(B)(1) and (2) regardless of whether the business already has a valid use and occupancy permit.

5. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection Results.

1. Within twenty (20) days of receiving the results of the investigation conducted by the police

department, codes department, fire department, and health department the board will meet and determine if the applicant is in compliance with the applicable statutes, ordinances, and regulations. If the board determines that the applicant is in compliance with the applicable statutes, ordinances, and regulations, including but not limited to the zoning code, and the applicant has not committed any of the crimes listed in 6.54.040(A)(5)(f), is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the license.

2. Any applicant convicted of or who pleaded *nolo contendere* to any crime of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be ineligible to receive a permit for the time period described below. Such denial and the reason for the denial shall be mailed to the applicant within ten (10) days of receiving the results of the investigation. The applicant may re-apply to the board once the time period has expired

(a) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction plea, or release from confinement imposed for the conviction whichever is later.

(b) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(c) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

3. If it is determined by the board, using the application and the investigation information, that the applicant has violated the provisions of the zoning code applicable to adult entertainment within the past two years, then the applicant is ineligible for a license for one (1) year from the date the citation was sustained. A violation of the zoning code shall be evidenced by a citation which has been sustained by any court in the metropolitan area.

4. If a diagram is required under 6.54.040(A)(6) and based on the code investigation, the board determines that the actual structure does not comply with 6 54 050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied until the applicant is in compliance.

5 If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application.

(a) The applicant shall be ineligible to receive a permit for one (1) year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6.54.040(A)(5)(f).

(b) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license

until all persons who will participate in the day to day operation of the business are eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(c) If the misleading statements or omissions referred to any of the crimes listed in 6 54.040(A)(5)(f), then the applicant shall not be eligible to receive a permit until the time period described in 6 54.040(C)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer

6. Within twenty (20) days of receiving the results of the investigation conducted by the police department, codes department, fire department, and health department, if the board shall determine that the applicant is not in compliance with the applicable statutes, ordinances, and regulations, the applicant shall be notified in writing that the license is denied for failing to comply with applicable statutes, ordinances, and regulations This notice shall specify the violation If the applicant can come into compliance as described m subsections 6.54.040(D) the denial shall not take effect The notice shall also specify that the applicant may request a hearing within ten (10) days as described in 6.54.040(E), cure the violation within fifteen (15) days and request re-inspection or request an extension of time as described in 6.54.040(D.).

7 The board has the discretion to hold any and all applications for further investigation if: (a) the initial investigation indicates a need for additional information, or (b) the initial investigation requires investigation into out of state records; or (c) verification of out of state employment is needed. Such additional investigation shall not exceed an additional

thirty (30) days, from the end of the initial twenty (20) days specified in 6.54.040(C)(6), unless otherwise agreed to by the applicant. Upon conclusion of such additional investigation, the board shall advise the applicant in writing whether the application is granted or denied in accordance with this section.

8. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing of the reasons for such action.

9. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at any reasonable time and place for examination under oath regarding said application or his or her refusal to submit to or cooperate with any investigation required by this ordinance, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection 6.54.040(C)(7).

10. No license shall be issued unless the police department has investigated the applicants criminal history by entering the information included on the application into the appropriate computer database or otherwise obtaining the information. The results of that investigation shall be filed in writing (this may be the print-out given by the computer database) with the board no later than thirty (30) days after the date application was received by the police department. This thirty (30) day period is the same thirty (30) days described in 6.54.040(B)(3).

D. Extensions of Time for the Applicant

1. If the license is denied under subsection 6.54.040(C)(6), the applicant may re-institute his/her

application by notifying the board in writing that he/she has come into compliance and requests re-inspection

(a) The applicant has fifteen (15) days from the mailing of the notice, given in 6 54.040(C)(6) to cure the violation and notify the board. If the violations have been corrected within the fifteen (15) day period, the owner has the responsibility to contact the board.

(b) The board has five days to notify the appropriate inspector that the applicant believes he/she has come into compliance

(c) Upon notification by the board the appropriate inspector shall return to the location for re-inspection and shall submit another written report as indicated in subsection 6.54.040(B)(3). The inspector has ten (10) days from the date he/she was notified by the board to re-inspect the premises and inform the board as to whether the applicant has come into compliance.

(d) Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance and if so the board shall issue the license at the next regular meeting.

(e) If the owner fails to either contact the appropriate inspector to report that the code violations have been corrected or if the code violations have not been corrected then the application is denied in accordance with 6 54.040(C)(6)

2. If the process of curing the violation requires more time than that provided in 6 54.040(D)(1), the applicant may request an extension from the board If

the applicant does not make such a request in the time allotted the application is denied in accordance with 6.54 040(C)(6) and 6.54 040(D)(3).

(a) The request for an extension must be made in writing within fifteen (15) days from the mailing of the notice given in 6.54.040(C)(6).

(b) The board shall hear the applicants request for an extension at the next regular meeting.

(c) The hearing on the extension shall follow the same rules as set out in 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

(d) An extension shall only be granted when board decides that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in 6.54.040(D)(1) including the time limit or fails to get an extension within the time allowed and in accordance with 6.54.040(D)(2) then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in 6.54.040(D)(1) or 6.54.040(D)(2) requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the notice sent in 6.54.040(C)(6) shall be treated as a denial of the license.

E. Denial of the License Application

1. When an application is denied, the applicant has the right to request a hearing within ten (10) days of notification.

(a) The request shall be in writing and filed with the board within ten (10) days of notification of the denial.

(b) Once the request is received by the board, the board shall schedule a hearing at the next regular meeting of the board.

(c) At the hearing, the applicant may present evidence as to why his/her license should not be denied

(d) The board shall hear all relevant evidence regarding the license application and the denial and shall affirm or reject the denial of the application at the hearing and in writing stating the reasoning for the boards decision. Denial of the application can be immediately appealed by the applicant to the Chancery Court of Davidson County. The metropolitan department of law may initiate an action for a declaratory judgment

(e) The denial of the license shall be mailed by US mail within ten (10) days to the address of the applicant as listed on the application.

(f) Failure on the part of the applicant to request a hearing within the time limit provided is a waiver of the right to a hearing by the board. This waiver has no effect whatsoever on the applicants right to appeal any denial to the Chancery Court of Davidson County.

2. Any denial of an application for a license may be immediately appealed to the Chancery Court of Davidson County The metropolitan department of law may institute proceedings for a declaratory judgment

6.54.050 Standards for issuance of license.

A. Physical Layout of Adult Entertainment Establishment.

1. Any adult entertainment establishment having available for customers, patrons or members any booth, room or cubicle for the private viewing of any adult entertainment, including but not limited to sexually oriented films, sexually oriented movies, adult videos or sexually oriented live exhibitions, shall submit a diagram under 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

2. Access. Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult entertainment establishment and shall be unobstructed by any door, gate, lock or other control-type devices.

3. Construction. Every booth, room or cubicle shall meet the following construction requirements.

(a) Each booth, room or cubicle shall be separated from adjacent booths, rooms and cubicles and any nonpublic areas by a solid or opaque wall;

(b) Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same,

(c) All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

(d) The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

(e) The lighting level of each booth, room or cubicle when not in use shall be a minimum of ten (10) foot candles at all limes as measured from the floor.

4. Occupants. Only one individual shall occupy a booth, room or cubicle at any time. No occupant of same shall engage in any type sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

5. The provisions enunciated in subsections 1 through 3 of this section shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, adult videos or sexually oriented live exhibitions.

B. The applicant.

1. To receive a license to operate an adult entertainment establishment, an applicant must meet the following standards.

(a) If the applicant is an individual the applicant shall be at least eighteen (18) years of age

(b) If the applicant is a corporation all officers directors and stockholders required to be named under section 6.54.040(A)(5)(j) shall be at least eighteen (18) years of age;

(c) If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest all

persons having a financial interest in the business and who have the ability to control or be involved in the day to day operation of the business shall be at least eighteen (18) years of age.

2 No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(j) and no partners required to be named under Section 6.54.040(A)(5)(k) who shall have been convicted of or have plead *nolo contendere* to any crime of rape. aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be eligible to receive a permit for the time period described below.

(a) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(b) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(c) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application.

(a) If the applicant gave any false or misleading information or omitted any material facts, than the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6.54.050(B)(2).

(b) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(c) If the misleading statements or omissions referred to any of the crimes listed in 6.54.050(B)(2) then the applicant shall not be eligible to receive a permit until the time period described in 6.54.050(B)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(d) If the misleading statements or omissions referred to violations of the zoning code then the applicant shall not be eligible to receive a permit until the time period described in 6.54 050(B)(4) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

4. No applicant shall have been found to have previously violated chapter 6.54 or violated the metropolitan zoning code applicable to adult entertainment

establishments, including but not limited to sections 17 12.080(29), 17.60.020, 17 64.270 as evidenced by citations issued and sustained by a court within one (1) year immediately preceding the date of the application. If such violations exist the applicant shall be ineligible for a license for one (1) year from the date the citation was sustained

6.54.060 Permit Required.

In addition to the license requirements previously set forth for owners and operators of adult entertainment establishments no person shall be an entertainer in an adult entertainment establishment without first obtaining a valid permit issued by the board

6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The original application with four copies shall be filed with and dated by the board. A copy of the application shall be distributed promptly by the board to the metropolitan nashville police department, and to the applicant.

2. The application for a permit shall be upon a form provided by the board. An applicant for a permit shall furnish the following information under oath:

(a) Name and address including all aliases,

(b) Written proof that the individual is at least eighteen (18) years of age,

(c) All residential addresses of the applicant for the past three (3) years (for the purpose

of facilitating the police investigation into the applicants criminal background);

(d) The applicants height, weight, color of eyes, and hair(for the purpose of facilitating the police investigation into the applicants criminal background);

(e) The business, occupation, or employment of the applicant for five (5) years immediately preceding the date of the application (for the purpose of facilitating the police investigation into the applicants criminal background);

(f) Whether the applicant while previously operating in this or any other city or state under an adult entertainment establishment permit or similar business for whom applicant was employed or associated at the time has ever had such a permit revoked or suspended the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

(g) Whether the applicant has ever been convicted of or pleaded *nolo contendere* to any and all crimes of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction;

(h) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant (for the purpose of facilitating the police investigation into the applicants criminal background); and

(i) A statement by the applicant that he/she is familiar with the provisions of this ordinance and is in compliance with them.

B. Standards for Issuance of Permit.

1 To receive a permit as an entertainer, an applicant must meet the following standards:

(a) The applicant shall be at least eighteen (18) years of age;

(b) An applicant who has been convicted of or who pleaded *nolo contendere* to any crime of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be ineligible to receive a permit for the time period described below.

(i) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(ii) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(iii) The time is computed from the date of the application to the date of the conviction,

plea, or release from confinement based on the conviction.

(c) The applicant shall not have given any false or misleading information on the application, omitted any material facts from the application.

(i) If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6 54.070(A)(2)(g)

(ii) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer

(iii) If the misleading statements or omissions referred to any of the crimes listed on 6.54.070(A)(2)(g) then the applicant shall not be eligible to receive a permit until the time period described in 6.54.070(B)(1)(b)(i) through (iii) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

(d) The applicant shall not have been found to violate any provision of chapter 6.54 within one (1) year immediately preceding the date of the application

C Investigation.

The police department shall investigate the criminal history of the applicant and submit this history in writing (this may be the print-out generated by a computer database) to the board within thirty (30) days of receipt of the application by the police department.

D Board Action Based on the Investigation.

1. The board shall convene to review the application and the police investigation report within fifteen (15) days of receiving the results of the investigation conducted by the police department. If the board determines, based on the application and the report of the police department that the applicant has not committed any of the crimes listed in 6.54 070(A)(2)(g), is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application the board shall grant the permit to the applicant at that meeting. Information regarding prior residence shall never be the basis for the denial of a permit.

2. Any applicant convicted of or who pleaded *nolo contendere* to any crime of rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or other similar crime of a sexual nature, or any crime involving moral turpitude in any jurisdiction shall be ineligible to receive a permit for the time period described below. Such denial and the reason for the denial shall be mailed to the applicant with in ten (10) days of the meeting described above in 6.54.070(D)(1). The applicant may re-apply to the

board once the time period described below has expired.

(a) If the conviction or plea was for a misdemeanor violation then the applicant shall be ineligible to receive a permit for two (2) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(b) If the conviction or plea was for a felony violation then the applicant shall be ineligible to receive a permit for five (5) years from the date of the conviction, plea, or release from confinement imposed for the conviction whichever is later.

(c) The time is computed from the date of the application to the date of the conviction, plea, or release from confinement based on the conviction.

3. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application.

(a) The applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or any of the crimes listed in 6.54.070(A)(2)(g).

(b) If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application

which contained the misleading statements or omissions whichever is longer.

(c) If the misleading statements or omissions referred to any of the crimes listed in 6.54.070(A)(2)(g) then the applicant shall not be eligible to receive a permit until the time period described in 6.54.070(D)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is longer.

4. The board may hold any and all applications for further investigation if (a) the initial investigation indicates a need for additional information; or (b) the initial investigation requires investigation into out-of-state records, or (c) verification of out of state employment is needed Such additional investigation shall not exceed an additional thirty (30) days unless otherwise agreed to by the applicant. Upon conclusion of such additional investigation, the board shall advise the applicant in writing whether the application is granted or denied in accordance with this section.

5. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing of the reasons for such action.

6 When an application is denied, the applicant has the right to requests a hearing within ten (10) days of receipt of notification of the denial.

(a) The request shall be in writing and filed with the board within ten (10) days of receipt of notification of the denial.

(b) Once the request is received by the board, the hearing will be held at the next regular meeting of the board.

(c) At the hearing, the applicant may present evidence as to why his/her permit should not be denied.

(d) The board shall hear evidence on the issues and shall affirm or reject the denial of an application at the hearing and in writing stating the reasoning for the boards decision.

(e) The denial of the permit shall be mailed by US mail within ten (10) days to the address of the applicant as listed on the application.

(f) Failure on the part of the applicant to request a hearing within the time limit provided is a waiver of the right to a hearing by the board. This waiver has no effect whatsoever on the applicants right to appeal any denial to the Chancery Court of Davidson County.

7. Any denial of the application for a permit may be immediately appealed to the Chancery Court of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment in the Chancery Court of Davidson County.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application or his or her refusal or failure to appear at any reasonable time and place for examination under oath regarding said application or his/her refusal to submit to or cooperate with any investigation required by this ordinance shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This provision in no way requires the applicant to agree to any extensions beyond the extension described in 6.54.070(D)(4).

6.54.080 Fees.

A. A license fee of five hundred dollars ($500.00) shall be submitted with the application for a license. If the application is denied one-half (½) of the fee shall be returned.

B. A permit fee of one hundred dollars ($100.00) shall be submitted with the application for a permit. If the application is denied one-half (½) of the fee shall be returned.

6.54.090 Display of license or permit.

A. The license shall be displayed in a conspicuous public place in the adult entertainment establishment.

B The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any customer, any member of the police department, or any person designated by the board

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be turned into the board.

6.54.100 Renewal of license or permit.

A. Every license/permit issued pursuant to this ordinance will terminate at the expiration of one (1) year from the date of issuance unless sooner revoked and must be renewed before operation is allowed in the following year

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board The application for renewal must be filed not later than sixty days (60) days before the license/permit expires. The original application for renewal plus six copies shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E The renewal form shall be the same form described in 6.54.040(A) for a license and 6.54.070(A) for a permit except as indicated below in subsection 6.54.100(H).

F. For a renewal the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year.

G. If the applicant chooses to only include information concerning items which have changed he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in 6.54.040(A) for a license or 6.54.070(A) for a permit except the final line shall state:

> *I swear the information I have given in the application from 199_ is still accurate and any facts or*

circumstances which have changed are indicated in this application for a renewal of the license/ permit

_____

signature of applicant

I. A license renewal fee of five hundred dollars ($500.00) shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars ($100.00) shall be assessed against the applicant who files for a renewal less than sixty (60) days before the license expires. If the application is denied, one-half (½) of the fee collected shall be returned

J. A permit renewal fee of one hundred dollars ($100.00) shall be submitted with the application for renewal. In addition to said renewal fee, a late penalty of fifty dollars ($50.00) shall be assessed against the applicant who files for renewal less than sixty (60) days before the license expires. If the application is denied, one-half (½) of the fee shall be returned.

K The application for a renewal is subject to the same rules and limitations including the time limits described for the initial application including subsections 6 54.040, 6.54 050, 6.54.070, and 6.54.140 (causes for revoking a license/permit) Giving false or misleading information or omitting material information on a renewal application is grounds for denying the renewal of the license/permit.

L. Denial of an application to renew a license/permit can be appealed to the board

1. A hearing by the board shall be requested, by the applicant or the applicants agent, within ten days of the denial for the renewal.

2 The board shall hold the hearing at the next regular meeting where the applicant will be given an opportunity to testify and cross examine all witnesses.

3. The previous license/permit shall continue to be valid until the board has rendered a decision and the ten days required in subsection 6.54.020(G)(3) have passed.

M. The denial of any renewal for a license/permit may be appealed to the Chancery Court of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the Chancery Court for Davidson County.

6.54.110 Hours of operation.

A. All adult entertainment establishments shall be closed between the hours of 2:00 a.m. and 6:00 a.m. Monday through Saturday and between the hours of 3:00 a.m. and 12:00 noon on Sundays.

B. All public areas of every adult entertainment establishments shall be open to inspection at any time during normal business hours by the following departments: police, codes, fire, and health.

6.54.120 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this ordinance shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, or renewed subject to the limit described in subsection 6.54.140(11)

B There shall be posted and conspicuously displayed in the common areas of each adult entertainment establishment a list of any and all entertainment provided on the premises Such list shall further indicate the specific fee or charge in dollar amounts for each entertainment listed. Viewing sexually oriented motion pictures, sexually oriented films, sexually oriented movies, sexually oriented live entertainment or adult videos shall be considered entertainment.

C No employee of an adult entertainment establishment shall allow any minor to loiter around or to frequent an adult entertainment establishment or to allow any minor to view adult entertainment as deemed herein.

D. Every adult entertainment establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further any wall forming any portion of the booths, cubicles, rooms or stalls shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with 6.54 050(A)

E It shall be unlawful to install enclosed booths, cubicles, rooms or stalls for the purpose of secluded viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films or adult videos or sexually oriented live entertainment

F The operator shall be responsible for and shall provide that any booth, cubicle, room, stall or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or adult videos or sexually oriented live entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety.

G. No operator, entertainer of an adult entertainment establishment shall demand or collect all or any portion of a fee for entertainment before its completion. This provision does not apply to any fee charged at the door for admittance to the premises, or any fee charged for food or beverages.

H. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

This Adult Entertainment Establishment is regulated by The Metropolitan Code of Nashville and Davidson County (Code Section #s). *Entertainers Are*

a Not permitted to engage in any type of sexual conduct;

b Not permitted to demand or collect all or any portion of a fee for entertainment before its completion

I. It shall be the duty of the operator, all entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, to ensure that the line of sight and view area between the main floor area and any stalls, booths, cubicles, or rooms remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that

any patron is permitted access to any room, booth, stall, or cubicle.

J. It shall be the duty of the operator, all entertainers and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, to ensure that the illumination described above is maintained at all times that any patron is present on the premises.

K No operator, entertainer or employee on the premises for furthering the business not including independent contractors on the premises for repairs or construction, shall allow openings of any kind to exist between viewing rooms, booths, stalls or cubicles, and no person shall make or attempt to make an opening of any kind between viewing rooms, booths, stalls or cubicles.

L. The operator or his/her agent shall, during each business day, regularly inspect the walls between the viewing rooms, booths, stalls or cubicles to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a viewing room, booth, stall or cubicle where an opening or a hole exists. It shall be the duty of the operator to ensure those rooms are unoccupied by patrons until the opening is repaired and covered.

6.54.130 Prohibitions and unlawful sexual acts.

A. No operator, entertainer, or employee of an adult entertainment establishment shall permit to be performed, offer to perform, perform, or allow customers employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.

B No operator, entertainer, or employee shall encourage or permit any person upon the premises to touch caress or fondle the breasts, buttocks, anus, or genitals of any other person

C. No entertainer, employee, or customer shall be permitted to have any physical contact with any other entertainer, employee, or customer on the premises during any performance All performances shall only occur upon a stage at least eighteen inches (18) above the immediate floor level and removed at least six (6) feet from the nearest customer.

6.54.140 Revocation or suspension of license/permit.

A. The board shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application,

2. The operator or entertainer becomes ineligible to obtain a license or permit under 6.54.050(B) and 6.54.070(B).

3. Any cost or fee required to be paid by this ordinance is not paid;

4. An operator employs an entertainer who does not have a permit or provides space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. Any intoxicating liquor, cereal malt beverage, narcotic, or controlled substance is sold or allowed to be sold on the licensed premises;

6. Any operator employee or entertainer sells, furnishes, gives, displays, or causes to be sold, furnished, given, or displayed to any minor any adult entertainment or sexually oriented material,

7. Any operator, employee, or entertainer denies access to law enforcement personnel during business hours to any portion of the licensed premises wherein adult entertainment is permitted or to any portion of the licensed premises wherein adult material is displayed or sold;

8. Any operator allows continuing violations of the metropolitan code or the rules and regulations of the following departments: health, codes, fire, or zoning, or any violations of this chapter.

9. Any operator fails to maintain the licensed premises in a clean, sanitary and safe condition in accordance with the applicable statutes, ordinances, and regulations of the federal, state, and local governments.

10. The attempted transfer of a license/permit or any interest in a license/permit shall automatically and immediately revoke the license

B. In the case of a first offense by an operator where the conduct was solely that of an entertainer the penalty shall not exceed a suspension of thirty (30) days if the board shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.

C Any and all other violations of this chapter shall be subject to either a fine or a suspension or both a fine and a suspension.

D The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer least ten (10) days written notice of the charges against him/her. In such cases the charges shall be specific and in writing except under 6.54.140(A)(10) above

2. The licensee/permittee shall have the opportunity for a hearing before the board at which time the operator or entertainer may present evidence bearing upon the question of suspension/revocation. The licensee/permittee has fifteen days from the receipt of the notice described above in 6.54.140(D)(1) to notify the board that he/she wishes to have a hearing.

3. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting.

4. If the licensee/permittee fails to request a hearing before the board within the fifteen days described in 6.54.140(D)(2) he/she will have waived the right to a hearing by the board. This has no effect, whatsoever, on the licensee's/ permittee's right to appeal any revocation to the Chancery Court of Davidson County.

5 If the licensee/permittee requests a hearing the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held. Further if the

license/permit is suspended or revoked the suspension/revocation shall not go into effect until the minimum ten (10) day waiting period has passed as described in 6.54.020(G)(3).

E. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one (1) year from the date of revocation

6.54.150 Penalties and prosecutions.

A. Any individual, partnership, or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. $500 00 for each offense; and/or

2. a suspension of any license/permit for a specified period of time for each offense; or

3. revocation of any license/permit for any conduct listed in subsection 6.54.140.

B. The penalty of suspension may not be combined with revocation A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this ordinance shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation

6.54.160 Remedies.

Any revocation or suspension of a license or a permit or any denial of a license or a permit or any denial to renew a license or a permit under the provisions of this chapter may be immediately appealed to the Chancery Court of Davidson County by the of Davidson County

by the applicant. Any fine levied under the provisions of this section may be immediately appealed to the Chancery Court of Davidson County by the applicant. The metropolitan department of law may institute proceedings for a declaratory judgment in the Chancery Court of Davidson County.

6.54.180 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause, or provision of this ordinance to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall effect only such section, clause, provision, or ordinance so declared unconstitutional, and shall not effect any other section, clause or provision of this ordinance.

SECTION 2: No application for a license or a permit shall be accepted or demanded until August 1, 1997.

SECTION 3: This ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO LEGALITY OF FORM AND COMPOSITION:	INTRODUCED BY:
/s/ Shayna Abrams	/s/ [Illegible]
Metropolitan Attorney	/s/ [Illegible]
/s/ [Illegible]	/s/ [Illegible]
/s/ [Illegible]	/s/ [Illegible]
/s/ [Illegible]	/s/ [Illegible]
/s/ [Illegible]	/s/ [Illegible]
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/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible] /s/ [Illegible]
/s/ [Illegible]

APPROVED AS TO AVAILABILITY OF FUNDS:

MEMBERS OF COUNCIL

/s/ [Illegible]
/s/ [Illegible]

I, being under oath, do certify this is a true and exact copy of Ordinance No 097-796 of The Metropolitan Government of Nashville and Davidson County, Tennessee which passed third and final reading on August 19, 1997, at the meeting of the Metropolitan Council held on that date, and is now recorded in Book No. M59, Page 160.

Witness my hand and the Seal of The Metropolitan Government of Nashville and Davidson County, Tennessee, this 25th day of August, 1997.

/s/ [Illegible]
Metropolitan Clerk

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me, by Marilyn S. Swing, this 25th day of August, 1997.

/s/ [Illegible]
Notary Public

My Commission expires 09/27/97

DUPLICATE

METROPOLITAN COUNTY COUNCIL

Bill No. O97-796

AN ORDINANCE AMENDING TITLE 6 OF THE METROPOLITAN CODE OF LAWS BY ADDING A NEW CHAPTER 6.54, LICENSING AND REGULATION OF ADULT ENTERTAINMENT AND ADULT BUSINESSES.

(Filed May 27, 1997)

Introduced JUN 3 1997

Passed first Reading JUN 3 1997

Referred to BUDGET & FINANCE; CODES; PUBLIC SAFETY; HEALTH, HOSPITALS & SOCIAL SERVICES COMMITTEES

~~Amended~~ DEFERRED JUN 17 1997 AMENDED & DEFERRED INDEFINITELY JUL 15 1997

AMENDED & *Passed second Reading* AUG 7 1997

Referred to _____

Passed third Reading AUG 19 1997

Approved AUG 25 1997

By [Illegible]
Metropolitan Mayor

Departments Notified _____

Advertised _____

Amendment No. 1
To
Bill No. O97-796

Mr. President:

I move to amend Bill No. O97-796 by adding a new sub-paragraph F to Section 6.54.070 to read as follows:

F. The permit carried by the entertainer shall contain only the following information: 1) A photo identification as provided by the applicant. 2) A computer generated number assigned to each applicant, corresponding to the file maintained on each applicant by the adult entertainment licensing board, and 3) The applicant's date of birth as indicated on the application.

INTRODUCED BY:

/s/ Chris Ferrell
Member of Council

ADOPTED: JULY 15, 1997

AMENDMENT NO. 2
TO
BILL NO. O97-796

Mr. President:

I move to amend Bill No. O97-796 by deleting the words "August 1" wherein it appears in Section 2,

on page 25, and placing in lieu thereof the words "November 1."

INTRODUCED BY:

/s/ Chris Ferrell
Member of Council

ADOPTED: JULY 15, 1997

AMENDMENT NO. 3
TO
BILL NO. O97-796

Mr. President:

I move to amend Bill No. O97-796 Section 2, by amending Section 6.54.010(A)(2) as follows:

1. Delete the definition of adult bookstore in Section 6.54.010(A)(2)(a) and substitute a new definition as follows:

> (a) *Adult bookstore* means an establishment having a majority of its stock and trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, adult videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. Delete the definition of adult video store in Section 6.54.010(A)(2)(e) and substituting a new definition as follows:

(e) *Adult video score* means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "adult videos" – as defined below – which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "adult videos", or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas" as defined below for observation by patrons therein.

INTRODUCED BY:

/s/ **Chris Ferrell**
Member of Council

ADOPTED: JULY 15, 1997

AMENDMENT NO. 4
TO
BILL NO. O97-796

Mr. President:

I move to amend Bill No. O97-796 by adding the words "on the premises for furthering the business but not including independent contractors on the premises for repairs and construction" after the word "employee" and before ", or customer shall be

permitted" wherein it appears in 6.54.130(C) Section 2.

INTRODUCED BY:

/s/ Chris Ferrell
Member of Council

ADOPTED: JULY 15, 1997

AMENDMENT NO. 5

TO

ORDINANCE NO. 097-796

Mr. President:

I move to amend Ordinance No. 097-796 as follows:

(1) By amending Section 6.54.110 of the Ordinance by adding a new Subsection (C) as follows:

> "(C) That Subsection (A) shall have no application to any premises within the historically significant area as defined in Section 6.54.130(D)."

(2) By amending Section 6.54.130 of the Ordinance by adding a new Subsection (D) as follows:

> "(D) Subsection (C) shall have no application to any premises wherein the building is less that twenty (20) feet in width and the ceilings support joyces of the premises are no more than 7-1/2 (seven and one-half) feet from the floor and which premises are located in a historically significant area and the business on said premises has been in operation for at least five (5) years.

Historically Significant Area for this purpose shall be defined as follows: That area of downtown Metropolitan Nashville bound by Second Avenue North, Church Street, Fourth Avenue North, and Union Streets."

INTRODUCED BY:

/s/ [Illegible]
Member of Council

ADOPTED: JULY 15, 1997

AMENDMENT NO. 6

TO

BILL NO. O97-796

Mr. President:

I move to amend Bill No O97-796 by

1 Deleting 6 54.110(C) which states

Subsection (A) shall have no application to any premises within the historically significant area as defined in Section 6.54.130(D)

2 Deleting 6.54 130(D) which states

Subsection (C) above shall have no application to any premises wherein the building is less than twenty (20) feet in width and the ceilings support joists of the premises are no more that 7½ (seven and one-half) feet from the floor, and which premises are located in a historically significant area and the business on said premises has been in operation for at least five (5) years

Historically significant Area for this purpose shall be defined as follows: That area of downtown Metropolitan Nashville bound by Second Avenue North, Church Street, Fourth Avenue North, and Union Streets

3 Amending Section 6 54 130(C) by deleting the word "six (6)" after "and removed at least" but before "feet from the nearest customer" and placing in lieu thereof the word "three (3)"

4 Amending Section 6 54 130(A) by adding the words "on the premises" after the words "of the genitalia"

5 Amending Sections 6 54.040(E)(2), 6 54 070(D)(7), 6 54 100(M), and 6 54 160 by adding the sentence "If the applicant or the permitee/licensee chooses to appeal by filing a writ of certiorari then The Metropolitan Government shall file the record of all proceedings to date (the date of the filing) with the court within ten (10) days from the date the Metropolitan Government was served" at the end of the paragraph

6. Amending Section 6 54.030(F) by deleting the words "at the time of the passage of this ordinance" after the words "All existing adult entertainment establishments" and before the words "must submit an application" By further amending Section 6 54 030(F) by adding subsection 1 and 2 as follows

1 All businesses which apply for a license within the one-hundred-twenty day period may continue to operate the adult business described in the application until the board has heard the application and voted to grant or deny the application as described in 6 54 040

2. Any appeal regarding the denial of the application shall be in accordance with 6.54.040(E)(2)

7. Amending Section 6.54.060 by lettering the existing paragraph as Section "A" and adding a Section "B" and a Section "C" as follows

> B All entertainers wishing to perform adult entertainment at an adult entertainment establishment shall have forty-five days from the date this ordnance becomes effective to obtain and submit an application for a permit All entertainers which apply for a permit within the forty-five day period may continue to operate at an adult entertainment establishment until the board has heard the application and voted to grant or deny the application
>
> C. If the application any appeal regarding the denial of the application shall be in accordance with 6.54 070(D)(6) and (7)"

8 Amending section 6.54.110 by deleting the time "2 00 am" and substituting in lieu thereof the time "3 00 am" after the words "between the hours of" and before "and 6 00 am" and by deleting the time "6 00 am" and substituting in lieu thereof the time "8 00 am" after the word "and" and before the words "Monday through Saturday"

INTRODUCED BY

/s/ [Illegible]
Member of Council

/s/ [Illegible]

ADOPTED: AUGUST 7, 1997

AMENDMENT NO. 7

TO

BILL NO. O97-796

Mr. President:

I move to amend Bill No. O97-796 by

1. Deleting the words "adult entertainment" and substituting in lieu thereof the words "sexually oriented" wherever the words appear in the ordinance except as specified below.

2. Deleting the words "adult entertainment establishment" and substituting in lieu thereof the words "sexually oriented business" throughout the entire ordinance.

3. Deleting the words "adult entertainment establishments" and substituting in lieu thereof the words "sexually oriented businesses" throughout the entire ordinance.

4. Deleting the word "adult" and substituting in lieu thereof the words "sexually oriented" wherever the word adult appears in the ordinance except; in Section 1(A) PURPOSE, the word "adults" after the words "or deny access by" and before the words "to sexually oriented materials protect" shall remain.

5. Deleting the word "an" and substituting in lieu thereof the word "a" before the words "sexually oriented business" wherever the word "an" precedes the words "sexually oriented business".

6. Amending the seventh whereas clause by deleting the word "entertainment" after the words "sexually oriented" and substituting in lieu thereof the word "business" and by changing the word "ordinance" to "ordinances" after the

words "sexually oriented business" and before "are unaffected by the following".

INTRODUCED BY:

/s/ [Illegible]
Member of Council

ADOPTED: AUGUST 7, 1997

SUBSTITUTE BILL NO. SO97-1022

A SECOND SUBSTITUTE ORDINANCE AMENDING CHAPTER 6.54 OF THE METROPOLITAN CODE OF LAWS RELATIVE TO LICENSING AND REGULATION OF ADULT ENTERTAINMENT.

NOW, THERFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY:

SECTION 1. Section 6.54.010 *Definitions,* is amended by adding the following definitions and re-lettering the definitions so that they are in alphabetical order:

"Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

"Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1998.

"Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1998.

"New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1998.

"New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1998.

SECTION 2. Section 6.54.020(G)(3) is amended by deleting the last sentence.

SECTION 3. Section 6.54.020(G)(6) is amended by deleting the subsection in its entirety and a new subsection (6) is enacted as follows:

(6) The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision.

SECTION 4. Section 6.54.030 (A) is amended by deleting the subsection in its entirety and a new subsection (A) is enacted as follows:

(A) Except as provided in subsection F of this section, from and after March 1, 1998, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

SECTION 5. Section 6.54.030(F)(1) and (2) is amended by deleting the subsections in their entirety and a new subsection (F) is enacted as follows:

(F) All existing sexually oriented businesses, as defined in 6.54.010, must submit an application for a license by June 30, 1998, or cease operations. All existing sexually oriented businesses which apply for a license by June 30, 1998, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with 6.54.040(E)(3). All new sexually oriented businesses, as defined in 6.54.010, may submit an application at

any time but may not operate until a license is granted except as permitted in 6.54.040(E)(4).

SECTION 6. Section 6.54.040(A)(1) is amended by deleting the word "promptly" after "A copy of the application shall be distributed" and before the words "by the board" and substituting the words "the next business day".

SECTION 7. Section 6.54.040(A)(5)(d) is deleted in its entirety and the remaining subsections are re-lettered as appropriate.

SECTION 8. Newly re-lettered subsection 6.54 040(A)(5)(d) is amended by adding the word "/permit" after every appearance of the word "license".

SECTION 9. Newly re-lettered subsection 6.54.040(A)(5)(e) is amended by deleting the subsection in its entirety and a new subsection (e) is enacted as follows:

(e) All convictions or pleas of *nolo contendere* to a crime of a sexual nature, as defined in subsection 6.54.010, or any crime involving moral turpitude punishable as a misdemeanor violation that has occurred within the past two years. All convictions or pleas of *nolo contendere* to a crime of a sexual nature, as defined in Subsection 6.54.010, or any crime involving moral turpitude punishable as a felony that has occurred within the past five years.

SECTION 10. Subsection 6.54.040(B) is amended by adding the words "and Investigations" to the title of that subsection.

SECTION 11. Subsection 6.54.040(B)(1) is amended by deleting the words "police department" after the word "The" in the first sentence and before the words "Codes

department, fire department and health department" and by adding the following at the end of that subsection:

> The police department shall investigate the applicant's criminal history by entering the information included on the application into the appropriate computer database or otherwise obtaining the described information. The results of both the inspections and the investigation shall be filed in writing (this may be the printout given by a computer database) with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no code violations and/or no applicable criminal history.

SECTION 12. Subsection 6.54.040(B)(3) is amended by adding the words "and investigation" after the words "complete their respective inspections" and before the words "and shall communicate the results" and by deleting the word "thirty" in the first sentence and substituting the word "twenty".

SECTION 13. Subsection 6.54.040(C) is amended by adding the words "and Investigation" to the title of that subsection after the word "Inspection".

SECTION 14. Subsection 6.54.040(C)(1) is amended by deleting the subsection in its entirety and a new subsection (1) is enacted as follows:

> (1) Within fifteen days of receiving the results of the investigation conducted by the police department and the inspections by the codes department, fire department and health department the board will meet and

determine if the applicant is in compliance with the applicable statutes, ordinances and regulations. If the board determines that the applicant is in compliance with the applicable statutes, ordinances and regulations, including but not limited to the zoning code, and the applicant has not committed a crime of a sexual nature, as defined in 6.54.010, or any crimes involving moral turpitude, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the license. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the license shall be deemed approved and notice sent to the applicant by United States Mail to the address listed on the application.

SECTION 15. Subsection 6.54.040(C)(2) is amended by deleting the subsection in its entirety and a new subsection (2) is enacted as follows:

(2) In the event the board denied the application in accordance with 6.54.050(B)(2), such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

SECTION 16. Subsection 6.54.040(C)(3) is amended by deleting the words "and the investigation information" after the words "using the application" and before the words "that the applicant has violated the provisions of" in the first sentence and substituting in lieu thereof the words "and the inspection reports".

SECTION 17. Subsection 654.040(C) is amended by adding a new subsection 4, renumbering the current subsection 4 as subsection 5 and, renumbering the remaining subsections as appropriate:

4. Any investigation reports or inspection reports not filed with the board in the time period specified in this subsection shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.

SECTION 18. Newly re-numbered subsection 6.54.040(C)(5) is amended by deleting the words "until the applicant is in compliance" at the end of the last sentence and substituting in lieu thereof "in accordance with 6.54.050(A) and (B)".

SECTION 19. Newly re-numbered subsection 6.54.040(C)(6) is amended by adding the words "in accordance with 6.54.050(B)(3)" at the end of the last sentence.

SECTION 20. Newly re-numbered subsection 6.54.040(C)(7) is amended by deleting the subsection in its entirety and a new subsection (7) is enacted as follows:

(7) Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, fire department and health department, if the board shall determine that the applicant is not in compliance with the applicable statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to comply with applicable statutes, ordinances and regulations. This notice shall specify the violation. If the applicant can come into compliance as described in 6.54.040(D), the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request re-inspection or request an extension of time.

SECTION 21. Newly re-numbered subsection 6.54.040(C)(8) is amended by deleting the subsection in its entirety and a new subsection (8) is enacted as follows:

> (8) The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection 6.54.040 (C)(1), unless otherwise agreed to by the applicant.

SECTION 22. Newly re-numbered subsection 6.54.040(C)(9) is amended by adding the words "the next business day" after the words "advise the applicant in writing".

SECTION 23. Newly re-numbered subsection 6.54.040(C)(10) is amended by deleting the words "subsection 654.040(C)(7) of this section" and substituting in lieu thereof "6.54.040(C)(8)" at the end of the last sentence.

SECTION 24. Newly re-numbered subsection 6.54.040(C)(11) is deleted in its entirety.

SECTION 25. Subsection 6.54.040(D)(1) is amended by deleting the words "subsection (C)(6)" in the first sentence and substituting in lieu thereof "6.54.040(C)(5) or (C)(7)"

SECTION 26. Subsection 6.54.040(D)(1)(a) is amended by deleting the subsection in its entirety and a new subsection (1)(a) is enacted as follows:

(a) The applicant has five days from the mailing of the denial described in 6 54.040(C)(5) or (C)(7) to cure the violation and notify the board or to request an extension pursuant to 6.54.040(D)(2). The applicant has the responsibility to contact the board.

SECTION 27. Subsection 6.54.040(D)(1)(b) is amended by deleting the subsection in its entirety and a new subsection (1)(b) is enacted as follows:

(b) Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

SECTION 28. Subsection 6.54.404(D)(1)(c) is amended by deleting the word "ten." after the words "The inspector has" and before the words "days from the date" and substituting the word "five" and by adding the words "using the same language required in 6.54.040(B)(3)" at the end of the last sentence.

SECTION 29. Subsection 6.54.404(D)(1)(d) is amended by adding an additional sentence at the end of the paragraph:

The next meeting shall be held no later than fifteen days after the inspection report is filed with the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in 6.54.040(C)(4).

SECTION 30. Subsection 6.54.404(D)(1)(e) is amended by deleting the word "owner" in the first sentence and substituting the word "applicant" and by deleting the words "subsection (C)(6) of this section" at the end of the last sentence and substituting the words "6.54.040(C)(5) or (C)(7)".

SECTION 31. Subsection 6.54.040(D)(2) is amended by deleting "(C)(6) and (D)(3) of this section" at the end of the last sentence and substituting the words "6.54.040(C)(5) or (C)(7) or (D)(3)".

SECTION 32. Subsection 6.54.404(D)(2)(a) is amended by deleting the subsection in its entirety and a new subsection (2)(a) is enacted as follows:

> (a) The request for an extension must be made in writing within five days from the denial described in 6.54.040(C)(5) or (C)(7).

SECTION 33. Subsection 6.54.404(D)(2)(b) is amended by adding an additional sentence at the end of the paragraph:

> The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

SECTION 34. Subsection 6.54.040(D)(2)(d) is amended by deleting the subsection in its entirety and a new subsection (2)(d) is enacted as follows:

> (d) An extension shall only be granted when the inspector from the Codes Department agrees that an extension is necessary and the Codes Inspector, the Health inspector, and the Fire Marshall agree that an extension will not endanger the health or safety of the community and the board decides that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

SECTION 35. Subsection 6.54.040(D)(3) is amended by deleting the subsection in its entirety and a new subsection (3) is enacted as follows:

(3) If the applicant fails to follow the procedure set out in 6.54.040(D) then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the denial described in 6.54.040(C)(5) and (C)(7) shall be treated as a denial of the application.

SECTION 36. Subsection 6.54.040(E)(1) is amended by deleting the subsection in its entirety and a new subsection (E)(1) is enacted as follows:

(1) When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. This has no effect, whatsoever, on the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing stating the reasoning for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

SECTION 37. Subsection 6.54.040(E)(2) is amended by deleting the subsection in its entirety and a new subsection (2) is enacted as follows:

(2) Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

SECTION 38. Subsection 6.54.040(E) is amended by adding a new subsection numbered (3) as follows:

(3) For an existing sexually oriented business, as defined in 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty (40) days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with 6.54.150(A)(10). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review.

SECTION 39. Subsection 6.54.040(E) is amended by adding a new subsection numbered (4) as follows:

> (4) For a new sexually oriented business, as defined in 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty (40) days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with 6.54.150(A)(10).

SECTION 40. Subsection 6.54.050(B)(2) and (B)(2)(a) are amended by deleting the subsections in their entirety and a new subsection (2) and (2)(a) is enacted as follows:

> (2) No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in 6.54.010, or any crime involving moral turpitude in any jurisdiction shall be eligible to receive a license for the time period described below.
>
> > (a) If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

SECTION 41. Subsection 6.54.050(B)(2)(b) and 6.54.050(B)(2)(c) is amended by deleting everything after the words "the date of the conviction".

SECTION 42. Subsection 6.54.050(B)(3)(a) is amended by deleting the subsection in its entirety and a new subsection (3)(a) is enacted as follows:

> (a) If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in 6.54.010, or any crime involving moral turpitude.

SECTION 43. Subsection 6.54.050(B)(3)(c) is amended by deleting the subsection in its entirety and a new subsection (3)(c) is enacted as follows:

> (c) If the misleading statements or omissions referred to a crime of a sexual nature, as defined in 6.54.010, or any crime involving moral turpitude, then the applicant shall not be eligible to receive a license until the time period described in 6.54.050(B)(2)(a) through (c) has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is longer.

SECTION 44. Subsection 6.54.050(B)(4) is amended by deleting the words "this chapter or violated" after the words "found to have previously violated" and before the words "the metropolitan zoning code applicable to sexually oriented businesses".

SECTION 45. Subsection 6.54.050(B) is amended by adding a new subsection (5) to read as follows:

> 5. If the applicant plans to have or has booths, cubicles or stalls for the purpose of viewing sexually oriented

motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos or sexually oriented live entertainment, then the booths, cubicles, or stalls must comply with the requirements set out in 6.54.050(A).

SECTION 46. Subsection 6.54.060(A) is amended by deleting the subsection in its entirety and a new subsection (A) is enacted as follows:

(A) Except as provided in subsection (B) of this section, from and after March 1, 1998, no person shall be an entertainer in a sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

SECTION 47. Subsection 6.54.060(B) is amended by deleting the subsection in its entirety and a new subsection (B) is enacted as follows:

(B) All current entertainers, as defined in Section 6.54.010. wishing to continue to perform sexually oriented entertainment must submit an application for a permit by April 15, 1998. All current entertainers, who apply for a permit by April 15, 1998, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as permitted in 6.54.070(D)(4).

SECTION 48. Subsection 6.54.070(A)(1) is amended by deleting the subsection in its entirety and a new subsection (1) is enacted as follows:

(1) Any person desiring to secure a permit shall make application to the board. The applicant shall file

the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville Police Department and the applicant.

SECTION 49. Subsection 6.54.070(A)(2) is renumbered as 6.54.070(A)(4) and new subsections (2) and (3) are added as follows:

(2) Application forms shall be available at the office of the board.

(3) The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

SECTION 50. Re-numbered subsection 6.54.070(A)(4) shall read "4. The applicant shall furnish the following information under oath:".

SECTION 51. Subsection 6.54.070(A)(4)(b) is amended by deleting the word "Written" at the beginning of that subsection.

SECTION 52. Subsection 6.54.070(A)(4) is amended by deleting subsection (e) in its entirety.

SECTION 53. Subsection 6.54.070(A)(2) is amended by re-lettering subsection (f) as (e) and substituting the following new subsection (e):

(e) Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business license/permit or similar business license/permit. For whom the applicant was employed or associated at the time. Whether the applicant has ever had such a license/permit revoked or suspended

the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

SECTION 54. Newly re-numbered subsection 6.54.070(A)(4) is amended by re-lettering subsection (g) as (f) and re-lettering the remaining subsections as appropriate and by substituting the following new subsection (f):

(f) All convictions or pleas of *nolo contendere* to a crime of a sexual nature, as defined in Section 6.54.010, or any crime involving moral turpitude punishable as a misdemeanor violation that has occurred within the past two years All convictions or pleas of *nolo contendere* to a crime of a sexual nature, as defined in Section 6.54.010, or any crime involving moral turpitude punishable as a felony that has occurred within the past five years.

SECTION 55. Newly re-numbered subsection 6.54 070(B) is amended by deleting subsection (B) in its entirety and substituting the following new subsection (B):

(B) The police department shall investigate the applicant's criminal history by entering the information included on the application into the appropriate computer database or otherwise obtaining the described information. The results of the investigation shall be filed in writing (this may be a printout given by a computer database) with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history.

SECTION 56. Newly re-lettered subsection 6.54.070(C) is amended by deleting it in its entirety and substituting the following new subsection (C):

(C) Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not committed a crime of a sexual nature, as defined in 6.54.010, or any crime involving moral turpitude, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

2. In the event the board denied the application in accordance with 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

3. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

4. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with 6.54.080.

5. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in section 6.54.070(D)(1), unless otherwise agreed to by the applicant.

6. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

7 Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at any reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in 6.54.070(C)(5).

Subsection 6.54.070(C) is further amended by deleting subsection (8) and (9).

SECTION 57. Subsection 6.54.070 is amended by deleting re-numbered subsection (D) and substituting a new subsection "D" entitled "Denial of the Permit Application".

SECTION 58. Newly re-numbered subsection 6.54 070(D)(1) is amended by deleting it in its entirety and substituting the following new subsection (D)(1):

(1) When an application is denied, the applicant has the tight to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. This has no effect, whatsoever, on the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing stating the reasoning for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

SECTION 59. Newly re-numbered subsection 6.54.070(D)(2) shall read as follows:

(2) Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of

law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

SECTION 60. Newly re-numbered subsection 6.54.070(D)(3) shall read as follows:

(3) For any current entertainer, as defined in 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty (40) days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with 6.54 150(A)(10). Adverse decisions of the board, which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review

SECTION 61. Newly re-numbered subsection 6.54.070(D)(4) shall read as follows:

(4) For a new entertainer, as defined in 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty (40) days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with 6.54.150(A)(10).

SECTION 62. Subsection 6.54.070(E)(2) is amended by deleting the words "adult entertainment" and substituting the words "sexually oriented"

SECTION 63. A new section is created numbered 6.54.080 and entitled "Standards for Issuance of a Permit" and all following sections are re-numbered accordingly. The new section will read as follows:

6.54.080 Standards for Issuance of a Permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in 6 54.010, or any crime involving moral turpitude in any jurisdiction shall be eligible to receive a permit for the time period described below.

    a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

    b. If the conviction or plea was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

    c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in 6.54.010, or any crime involving moral turpitude.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is longer.

c. If the misleading statements or omissions referred to a crime of a sexual nature. as defined in 6.54.010, or any crime involving moral turpitude, then the applicant shall not be eligible to receive a permit until the time period described in 6.54.080(A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is longer.

SECTION 64. Newly re-numbered subsection 6.54.110(A) is amended by deleting the words "is allowed in" after the words "renewed before operation" and before the words "the following year".

SECTION 65. Newly re-numbered subsection 6.54.110(B) is amended by deleting the words "six copies"

and substituting the words "plus the number of copies listed in subsection 6.54.040(A) or 6.54.070(A)".

SECTION 66. Newly re-numbered subsection 6.54.110(K) is amended by deleting the following words "included in Sections- 6.54.040, 6.54.050, 6.54.070 and 6.54.140 (causes for revoking a license/permit)" at the end of the first sentence.

SECTION 67. Newly re-numbered subsection 6.54.110(L)(1) and (2) are amended by deleting these subsections in their entirety and substituting in a new (L) as follows:

> L. When an application for renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.
>
> 1. The request shall be in writing and filed with the board within five days of the board's decision.
>
> 2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shalt be held no later than fifteen days after the request described above is mailed.
>
> 3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. This has no effect, whatsoever, on the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.
>
> 4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing stating the reasoning for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty (40) days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a license/permit then that license/permit shall be revoked in accordance with 6.54.150(A)(10). Adverse decisions of the board which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review.

SECTION 68. Newly re-numbered subsection 6.54.110(M) is amended by deleting the subsection in its entirety and substituting the following new subsection (M):

(M) The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari.

SECTION 69. Newly re-numbered subsection 6.54.130(A) is amended by deleting "6.54.140(B)" at the end the of paragraph and substituting in lieu thereof the letter "6.54.150(C)".

SECTION 70. Newly re-numbered subsection 6.54.130(C) is amended by deleting the word "deemed" in the last sentence and substituting in lieu thereof the word "defined".

SECTION 71. Newly re-numbered subsection 6.54.130(G) is deleted in its entirety and the remaining sections re-lettered consecutively.

SECTION 72 Newly re-numbered subsection 6.54.130(G) is amended to read as follows:

> G. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:
>
> *This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County. Chapter 654 which provides that no entertainer or customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.*

SECTION 73. Newly re-numbered subsection 6.54.130(I) is amended by deleting the words "all entertainers" in the first line and by adding the words "in booths, stalls, or cubicles" after the words "to ensure that the illumination" and before the words "described to Section" and by deleting the letter "(r)" and substituting in lieu thereof the roman numeral "(iv)".

SECTION 74. Newly re-numbered subsection 6.54.150(A)(8) through (10) are amended by deleting the subsections in their entirety and substituting the following new subsections (8)-(10):

8. Any operator fails to maintain the licensed premises in a clean, sanitary and safe condition by maintaining or allowing continuing violations of the metropolitan code or the rules and regulations of the following departments: health, codes, fire, zoning or any violations of this chapter which result in a threat to the health or safety of the community.

9. The attempted transfer of a license/permit or any interest in a license/permit shall automatically and immediately revoke the license.

10. If an application for a license/permit or a renewal of a license/permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license/permit shall be revoked on the effective date of the court's judgement.

SECTION 75. Newly re-numbered subsection 6.54.150 is amended by adding a new subsection (B) as follows and renumbering the remaining subsections consecutively.

B. The board shall suspend a license or permit for any of the following reasons:

1. A first time offense, which poses a threat to the health or safety of the community. For any violation which is a threat to the health and safety of the community and is also a first time offense, the suspension shall not be longer than seven (7) days.

2. A violation of this chapter or the metropolitan code which is not a threat to the health and safety of the community and has occurred more than three times over a period of two years.

3. No suspension shall be for less than one full twenty-four hour period for any violation.

SECTION 76. Newly re-numbered subsection 6.54.150(D) is amended by deleting the subsection in its entirety and substituting the following new subsection (D):

(D) Other violations not listed in 6.54.150(A) of this chapter may be subject to a fine in an amount not to exceed five hundred dollars ($500.00) for each violation.

SECTION 77. Newly re-numbered subsection 6.54.150(E)(1) is amended by deleting the words "at least ten" and substituting in lieu thereof the word "five" and by deleting the word "charges" and substituting in lieu thereof the words "alleged violation(s)" and by deleting the words "subsection (A)(10)" and substituting in lieu thereof the words "6.54.150 (A)(9) and (10)" at the end of that paragraph.

SECTION 78. Newly re-numbered subsection 6.54.150(E)(2) is amended by deleting the subsection in its entirety and substituting the following new subsection (2):

(2) The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting. The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

SECTION 79. Subsection 6.54.150(E)(3) is deleted in its entirety and the remaining subsections renumbered consecutively.

SECTION 80. Newly re-numbered subsection 6.54.150(E)(3) is amended deleting the subsection in its entirety and substituting the following new subsection (3):

> (3) If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. This has no effect, whatsoever, on the licensee's/ permittee's right to appeal any revocation to the chancery court of Davidson County.

SECTION 81. Newly re-numbered subsection 6.54.150(E)(4) is amended by deleting the last sentence.

SECTION 82. Newly re-numbered subsection 6.54.150(E)(5) is amended by deleting the subsection in its entirety and substituting the following new subsection (5):

> (5) Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review.

SECTION 83. Newly re-numbered subsection 6.54.150(E) is amended by adding a new subsection (6) to read as follows:

> (6) The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of

Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari.

SECTION 84. Wherever the words "chancery court" appears substitute the words "circuit or chancery courts".

SECTION 85. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO
LEGALITY OF FORM
AND COMPOSITION:

/s/ [Illegible]
Metropolitan Attorney

RECOMMENDED BY:

_____

/s/ [Illegible]

_____
Members of Council

No. 05-1194

(2)

Supreme Court, U.S.
FILED
MAY 19 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 119 TO 325

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DUPLICATE

METROPOLITAN COUNTY COUNCIL

SUBSTITUTE Bill No. O99-1503

An ordinance to amend Title 6, Chapter 6.54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

Introduced _____

Passed first Reading _____

Referred to _____

~~Amended~~ SUBSTITUTE BILL FILED FEB 2 1999

Passed second Reading FEB 2 1999

Referred to CODES, PUBLIC SAFETY, and HEALTH, HOSPITALS & SOCIAL SERVICES COMMITTEES

AMENDED & Passed third Reading FEB 16 1999

Approved FEB 17 1999

By [Illegible]
Metropolitan Mayor

Departments Notified FEB 17 1999

Advertised _____

Substitute Bill No. O99-1503

An ordinance to amend Title 6, Chapter 6.54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

Whereas, various changes need to be made to Chapter 6.54 to make the ordinance's subsections consistent with one another.

Now therefore, be it enacted by the Metropolitan Council of Nashville and Davidson County as follows:

Section 1. Sections 6.54.010(D), (G), (L), (M), 6.54.030(A), 6.54.060(A) of the Metropolitan Code of Nashville and Davidson County ("MCL") are amended by deleting the date, "March 1, 1998" and substituting in lieu thereof the date "March 1, 1999"

Section 2. Section 6.54.010(W) of the MCL is amended by deleting the definition of "Sexually oriented" in its entirety and substituting the following in lieu therefore:

> W. "Sexually oriented" means any exhibition of any motion pictures, films, videos or live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers which has a significant or substantial portion of such performance or service any actual or simulated performance depicting "specified sexual activities" or exhibition and viewing of "specified anatomical areas."

Section 3. Section 6.54.010(X) of the MCL is amended by deleting the definition of "Sexually oriented

business/establishment" in its entirety and substituting the following in lieu therefore:

> "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein. "Sexually oriented business/establishment" also means any commercial establishment to which the public, patrons or members are invited or admitted and which are so physically arranged as to provide booths, separate from the common areas of the premises for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos.

Section 4. Section 6.54.030(E) is amended by adding the word "knowingly" after the words "It is unlawful for any entertainer or operator to" and before the words "work in or about," and after the words "work in or about, or to" and before the words "perform any service directly related to the operation of any unlicensed sexually oriented business."

Section 5. Section 6.54.030(F) is amended by deleting the date "June 30, 1998" where it appears and substituting in lieu therefore "March 15, 1999".

Section 6. Section 6.54.040(A)(1) of the MCL is amended by deleting the words "the fire department" after the words "the police department, the department of codes administration, the health department" and before the words "and the applicant." at the end of the paragraph.

Section 7. Section 6.54.040(A)(4) of the MCL is amended by deleting the words "obtain a license" and substituting in lieu therefore "be listed in the license application for any sexually oriented business" after the words "The following persons" and before the words "any partner of a partnership" in the first sentence of that subsection.

Section 8. Section 6.54.040(A)(5)(a) of the MCL is amended by adding the words "of the applicant" after the words "Name and address" and before the words "including all aliases".

Section 9. Section 6.54.040(A)(4)(b) of the MCL is amended by deleting that subsection in its entirety and substituting in lieu thereof:

> Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age.

Section 10. Section 6.54.040(A)(5)(c) of the MCL is amended by adding the words "regarding crimes of a sexual nature" in the parentheses after the words "investigation into the applicant's criminal background" and before the semicolon.

Section 11. Section 6.54.040(A)(5)(d) of the MCL is amended by adding the words "within the last two years from the date of application," after the words "Whether the applicant has ever had such a license/permit revoked or suspended," and before the words "the reason therefore, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;"

Section 12. Section 6.54.040(A)(5)(e) of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore:

> e. All convictions to a crime of a sexual nature, as defined in subsection 6.54.010, punishable as a misdemeanor violation that has occurred within the past two years. All convictions to a crime of a sexual nature, as defined in Subsection 6.54.010, punishable as a felony that has occurred within the past five years.

Section 13. Section 6.54.040(A)(5)(f) of the MCL of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore:

> f. All judgements by a court within the past two years for violations of the metropolitan zoning Section 17.64.260;

Section 14. Section 6.54.040(A)(5)(g) of the MCL is amended by deleting the word "portrait" after the words "Fingerprints and two" and before the words "photographs at least two inches by two inches" and by adding the words "regarding crimes of a sexual nature" in the parentheses after the words "investigation into the applicant's criminal background" and before the semicolon.

Section 15. Section 6.54.040(A)(6) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

> if the applicant intends to have booths, , or sexually oriented videos, then in addition, the applicant shall provide the board, with his/her application, a diagram, drawn to scale, of the premises including the location and layout of all booths and the location of the clerk/manager's

stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

Section 16. Section 6.54.040(B)(1) of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore:

B. Inspections & Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1) of this ordinance. The health department shall inspect the premises to insure compliance with applicable heath code statutes, ordinances, and regulations. The police department shall investigate the applicant's criminal history by collecting the applicants fingerprints and 2X2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall he filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shaft not prevent the applicant from receiving the license and shall he treated by the board as if the report revealed no sexually oriented business/adult entertainment zoning code violations and/or no applicable criminal history. Subject to 6.54.150.

Section 17. Section 6.54.040(B)(2) of the MCL is amended by deleting the words "stalls, cubicles or rooms"

after the words "confirm the layout of the booths." and before the words "complies with the submitted diagram".

Section 18. Section 6.54.040(B)(3) is amended by deleting that subsection in its entirety and substituting in lieu therefore:

> The police department shall complete its investigation and the codes department, and health department shall complete their respective inspections and shall communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:
>
> > *The location at* _____ *complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.*
> >
> > *The location at* _____ *does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.*
>
> The writing from the police department shall end with substantially the following statement:
>
> > *The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes:*
> >
> > *Name* *Crime* *Date*

Section 19. Section 6.54.040(B)(4) of the MCL is amended by deleting the subsection in its entirety and renumbering accordingly.

Sectoin 20. Section 6.54.040(C) of the MCL is amended by deleting paragraph 1 in its entirety and substituting the following and renumbering the remaining subsections accordingly.

> 1. Within fifteen days of receiving the results of the investigation conducted by the police department and the inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this code section and the applicable health statutes, ordinances and regulations.
>
> 2. If the board determines that the applicant is in compliance with the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.
>
> 3. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

Section 21. Section 6.54.040(C)(3) is amended by deleting paragraph 3 in its entirety and substituting the following and renumbering this subsection as number "5".

> 5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a license for one year from the date the citation was sustained. A violence of the zoning code shall be evidenced by a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant until the judgement is reversed.

Section 22. Section 6.54.040(C)(4) is amended by adding the following sentence to the end of the paragraph, "False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application."

Section 23. Section 6.54.040(C)(7) of the MCL is amended by renumbering this subsection as subsection "9" and by deleting the words "fire department" after the words "inspection reports from the codes department" and before the words "and health department," and by deleting the words "the applicable statutes, ordinance, and regulations" and substituting in lieu therefore the words "this code section or the applicable health statutes, health and zoning ordinances and health and zoning regulations" after the words "if the board shall determine that the applicant is not in compliance with" and before the words

"the applicant shall be notified in writing, the next business day".

Section 24. Section 6.54.040(C)(9) of the MCL is amended by adding the words "False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application." at the end of that subsection and by renumbering this subsection as "11".

Section 25. Section 6.54.040(C)(10) of the MCL is amended by deleting the word "any" and substituting in lieu therefore the word "a" after the words "or his or her refusal or failure to appear at" and before the words "reasonable time and place for examination under oath regarding such application".

Section 26. Section 6.54.040(D)(1), 6.54.040(D)(1)(a) and 6.54.040(D)(1)(e) of the MCL are amended by deleting the reference to "6.54.040(C)(5)" and substituting in lieu therefore "6.54.040(C)(4)". Further 6.54.040(D)(1)(a) is amended by deleting the word "five" in the first line and substituting in lieu therefore the word "fifteen".

Section 27. Section 6.54.040(D)(1)(d) of the MCL is amended by deleting the reference to "6.54.040(C)(4)" and substituting in lieu therefore "6.54.040(C)(6)".

Section 28. Section 6.54.040(D)(2)(d) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

> d. An extension shall only be granted when the Codes inspector and the Health inspector the agree that an extension will not endanger the health or safety of the community and the board determines that the applicant has demonstrated

a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

Section 29. Section 6.54.040(E)(1)(c) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

e. At the hearing, the applicant may present evidence as to why his/her license should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

Section 30. Section 6.54.040(E)(1)(d) of the MCL is amended by deleting the word "stating" and substituting in lieu therefore the word "state" after the words "the application at the hearing and in writing" and before the words "the reasoning for the boards decision." Further Section 6.54.040(E)(1)(d) of the MCL is amended by deleting the word "reasoning" and substituting in lieu therefore the word "reasons" after the words "at the hearing and in writing state the" and before the words "for the board's decision."

Section 31. Section 6.54.050(A)(1) of the MCL is amended by deleting the words "room or cubicle" after the words "having available for customers, patrons or members any booth" and before the words "for the private viewing of any sexually oriented entertainment" and by deleting the word "private" after the words "patrons or members any booth, room or cubicle for the" and before the words "viewing of any sexually oriented entertainment" and by deleting the words "or sexually oriented live exhibitions" after the words "sexually oriented films,

sexually oriented movies, sexually oriented videos" and before the words "shall submit a diagram under Section 6.54.040(A)(6)".

Section 32. Section 6.54.050(A)(1)(a) of the MCL is amended by deleting the words "room or cubicle" after the words "Access. Each booth," and before the words "shall be totally accessible to and from aisles".

Section 33. Section 6.54.050(A)(1)(b) of the MCL is amended by deleting the words "room or cubicle" after the words "Construction. Every booth" and before the words "shall meet the following"

Section 34. Section 6.54.050(A)(1)(b)(i) of the MCL is amended by deleting the words "room or cubicle" after the words "Each booth," and before the words "shall be separated from" and by deleting the words "rooms and cubicles" after the words "shall be separated from adjacent booths," and before the words "and any nonpublic areas by a solid or opaque wall;"

Section 35. Section 6.54.050(A)(1)(b)(v) of the MCL is amended by deleting the words "room or cubicle" after the words "The lighting level of each booth" and before the words "shall be a minimum of ten footcandles".

Section 36. Section 6.54.050(A)(1)(c) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore:

> c. Occupants. Only one individual shall occupy a booth, at any time. No occupant of a booth shall engage in any type copulation, masturbation or the display of specified anatomical areas as defined herein, cause any bodily discharge of urine,

> feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

Section 37. Section 6.54.050(A)(2) of the MCL is amended by deleting the words "or sexually oriented live exhibitions" at the end of that subsection.

Section 38. Section 6.54.050(B)(1)(b) of the MCL is amended by deleting the reference to subsection "6.54.040(A)(5)(j)" and substituting in lieu therefore "6.54.040(A)(5)(i)".

Section 39. 6.54.050(B)(1)(c) of the MCL is amended by deleting the words "have the ability in control or be" and substituting in lieu therefore the word "are" after the words "all persons having a financial interest in the business and who" and before the words "involved in the day-to-day operation of the business".

Section 40. 6.54.050(B)(2) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "convicted of a crime of a sexual nature, as defined in 6.54.010," and before the words "in any jurisdiction shall be eligible to receive a license.

Section 41. 6.54.050(B)(2)(c) of the MCL is amended by deleting this subsection in ist entirety and substituting the following in lieu therefore:

> The time is computed from the date of the conviction by the trial court to the date of the application. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

Section 42. 6.54.050(B)(3) of the MCL is amended by adding the words "False or misleading information does

not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.." at the end of that subsection.

Section 43. 6.54.050(B)(3)(a) of the MCL is amended by deleting the words "or any crime involving moral turpitude" at the end of that subsection paragraph.

Section 44. 6.54.050(B)(3)(b) and 6.54.050(B)(3)(d) of the MCL is amended by deleting who word "longer" and substituting in lieu therefore the word "later" The amendment is to the last word in both subsections.

Section 45. 6.54.050(B)(3)(e) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "crime of a sexual nature, as defined in 6.54.010." and before the words "then the applicant shall not be eligible to receive a license" and by deleting the word "longer" at the end of this subsection and substituting in lieu therefore the word "later".

Section 46. 6.54.050(B)(3)(c) of the MCL is amended by adding the words "Chapter 17.36.260 of" after the words "If the misleading statements or omissions referred to violation of" and before the words "the zoning code" and by deleting the word "longer" at the end of this subsection and substituting in lieu therefore the word "later".

Section 47. 6.54.050(B)(4) of the MCL is amended by adding a new subsection 4 and renumbering the subsequent subsections accordingly. New subsection "4" shall read,

> 4. The applicant shall not have had a sexually oriented business permit/license or similar business permit/license revoked within the last year immediately preceding the application.

Section 48. Renumbered Section 6.54.050(B)(5) of the MCL is amended by deleting that subsection in its entirety and substituting in lieu therefore:

> 5. No applicant shall have been found to have previously violated Chapter 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect an the disqualification of the applicant until the trial court's judgement is reversed.

Section 49. 6.54.050(B)(5) of the MCL is amended by renumbering this subsection as "6" and by deleting the words "cubicles or stalls" after the words "if the applicant plans to have or has booths," and before the words "for the purpose of viewing sexually oriented motion pictures," and by deleting the words "or-sexually oriented live entertainment" after the words "sexually oriented movies, sexually oriented films, sexually oriented videos" and before the words "then the booths," and by deleting the words "cubicles or stalls" after the words "then the booths" and before the words "must comply with the requirements set out in 6.54.050(A)."

Section 50. 6.54.060(B) of the MCL is amended by deleting each date of "April 15, 1998" and substituting in lieu therefore the date "March 15, 1999"

Section 51. Section 6.54.070(A)(2) of the MCL is amended by deleting it in its entirety and the following substituted in lieu therefore:

> Application forms shall be available at the office of the board. Applicants may obtain their implication from the codes department. Applicants must also submit with each application two 2X2 photos.
>
> a. Background check. All background checks shall be completed by the metropolitan police department. The police department my be notified of a need for a background check in two ways. The applicant brings her application, including a one of the two photos to the police department and has her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.
>
> b. Fingerprints. The applicant may have his/her fingerprints completed by the police department or other qualified person.
>
> c. Fees. If the applicant brings her application to the police department, the police department shall not charge the applicant any

additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department than it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give then to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the $100.00 permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints taken by a qualified person other than the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

Section 52. Section 6.54.070(A)(4)(b) of the MCL is amended by deleting that subsection in its entirety and substituting the following in lieu therefore: "Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;"

Section 53. Section 6.54.070(A)(4)(c) of the MCL is amended by adding the words "regarding crimes of a sexual nature" inside the parentheses at the end of that subsection.

Section 54. Section 6.54.070(A)(4)(d) of the MCL is amended by adding the words "regarding crimes of a sexual nature" inside the parentheses at the end of that subsection.

Section 55. Section 6.54.070(A)(4)(c) of the MCL is amended by deleting the word "operated" and substituting

in lieu therefore the word "entertained" after the words "Whether the applicant previously" and before the words "in this or any other county, city or state under a sexually oriented business license/permit" and by adding the words "within the last two years" after the words "under a sexually oriented business license/permit or similar business license/permit" and before the words "For whom the applicant was employed or associated at the time." And by deleting the word "ever" after the words "Whether the applicant has" and before the words "had such a license/permit revoked as suspended," and by adding the words "within the last two years and" after the words "had such a license/permit revoked or suspended," and before the words "the reason therefor and the business entity or trade name".

Section 56. Section 6.54.070(A)(4)(f) of the MCL is amended by deleting that subsection in its entirety and substituting the following in lieu therefore:

> All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that has occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that has occurred within the past five years.

Section 57. Section 6.54.070(A)(4)(g) of the MCL is amended by adding the words "regarding crimes of a sexual nature" inside the parentheses at the end of that subsection and before the semicolon and the word "and".

Section 58. Section 6.54.070(B) of the MCL is amended by deleting that subsection in its entirety and substituting the following in lieu therefore:

Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2X2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history. Subject to 6.54.150.

Section 59. Section 6.54.070(C)(1) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore and renumbering the following paragraphs sequentially.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in 6.54.010, has not had a similar type of permit/license revoked in the last two years is at least eighteen years of age, and has not given may false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not mean any information which the applicant had reason to believe was correct.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application.

Section 60. Section 6.54.070(C)(4) of the MCL is amended by adding the words "False or misleading information does not mean any information which the applicant had reason to believe was correct," at the end of the paragraph.

Section 61. Section 6.54.070(C)(5) of the MCL is amended by adding the words "the revocation of" after the words "b) verification of out-of-state employment relating to a sexually oriented business or" and before the words "a sexually oriented business license/permit or similar business"

Section 62. Section 6.54.070(C)(7) of the MCL is amended by deleting the word "any" after the words "or his/her refusal or failure to appear at" and before the words "reasonable time and place for examination under oath".

Section 63. Section 6.54.070(D)(3) of the MCL is amended by adding the letter "B" between "6.54.150" and the number "10".

Section 64. Section 6.54.070(D)(4) of the MCL is amended by deleting the letter "A" at the end of the paragraph and substituting in lieu therefore the letter "B".

Section 65. Section 6.54.080(A)(2) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "No applicant convicted

of a crime of a sexual nature, as defined in 6.54.010," and before the words "in any jurisdiction shall be eligible to receive"

Section 66. Section 6.54.080(A)(2)(b) of the MCL is amended by deleting the words "or plea" after the words "If the conviction" and before the words "was for a felony violation"

Section 67. Section 6.54.080(A)(3) of the MCL is amended by adding the words "False or misleading information does not mean any information which the applicant had reason to believe was correct" at the end of the paragraph.

Section 68. Section 6.54.080(A)(3)(a) of the MCL is amended by deleting the words "or any crime involving moral turpitude" at the end of the paragraph.

Section 69. Section 6.54.080(A)(3)(c) of the MCL is amended by deleting the words "or any crime involving moral turpitude" after the words "If the misleading statements or omissions referred to a crime of a sexual nature, as defined in 6.54.010" and before the words "then the applicant shall not be eligible to receive a permit"

Section 70. Section 6.54.080 is amended by adding a subsection "4" which shall read as follows:

> 4. The applicant shall not have had a sexually oriented business permit/license or similar business permit revoked within the last year immediately preceding the application.

Section 67. Section 6.54.090(C) is amended by deleting the words "turned into the board" and substituting in

lieu therefore the words "returned to the board and cease to be valid." at the end of that subsection.

Section 71. Section 6.54.100 of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

Section 72. Section 6.54.110(F) of the MCL is amended by adding the following to the end of the paragraph:

> The renewal must also include an updated background check by the police department and an updated 2X2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

Section 73. Section 6.54.110(K) of the MCL is amended by deleting this subsection in its entirety and substituting the following in lieu therefore:

K. The application for a renewal is subject to the same rules and limitations as the initial application.

Section 74. Section 6.54.120(B) of the MCL is amended by deleting the word "fire" and substituting in lieu therefore the words "board inspector" after the words "the following departments: police, codes," and before the words "and health" at the end of the paragraph.

Section 75. Section 6.54.130(A) of the MCL is amended by deleting the word "or" after the words "operator's license shall be revoked, suspended" and before the word "renewed" and by adding the words "or penalty assessed" after the word "renewed" and before the words "subject to the limit described in Section 6.54.150(C)" and by deleting the word "limit" and substituting in lieu therefore the word "limits" after the words "subject to the" and before the words "described in Section 6.54 150(C)" at the end of that subsection and by deleting the code section "6 54 130(C)" and substituting in lieu therefore "6.54.120(E)"

Section 76. Section 6.54.130(B) of the MCL is amended by deleting the subsection in its entirety and re-lettering the subsections accordingly.

Section 77. Section 6.54.130(C) of the MCL is amended by adding the words "on the premises of a licensed business," at the end of the paragraph.

Section 78. Section 6.54.130(D) of the MCL is amended by deleting the words "cubicles, rooms or stalls" after the words "the entire interior portion of the booths" and before the words "wherein sexually oriented entertainment is provided, shall be visible" and by deleting the words "cubicles, rooms or stalls" after the words "Further, any wall forming any portion of the booths," and before the words "shall be solid and without any openings, extended from the floor to a height of not less than six feet."

Section 79. Section 6.54.130(E) of the MCL is amended by combining 6.54.130(E) and 6.54.130(F) and renumbering the remaining sections accordingly.

> E. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

Section 80. Section 6.54.130(G) of the MCL is amended by amending the wording for the required signage by deleting the words "entertainer or" appearing after the words "which provides that" and before the words "Customer shall be permitted.

Section 81. Section 6.54.130(H) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time any patron is permitted access to any booth.

Section 82. Section 6.54.130(I) of the MCL is amended by deleting the words "stalls or cubicles" after the words "to ensure that the illumination in booths" and

before the words "described in Section 6.54.050(A)(1)(b)(iv) is maintained at all times" and by deleting the code section "6.54.050(A)(1)(b)(iv)" and substituting in lieu therefore "6.54.050(A)(1)(b)(v)".

Section 83. Section 6.54.130(J) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> No operator, shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

Section 84. Section 6.54.130(K) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operators to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered.

Section. 85. Section 6.54.140(A) of the MCL is amended by adding the words "on the premises for furthering the business, not including independent contractors on the premises for repairs or construction," after the words "No operator, entertainer or employee" and before the words "of a sexually oriented business shall permit to be performed,".

Section 86. Section 6.54.140(B) of the MCL is amended by adding the words "on the premises for furthering the business, not including independent contractors on the premises for repairs or construction," after the words "No operator, entertainer or employee" and before the words "shall encourage or permit any person upon the premises to touch".

Section 87. Section 6.54.140(C) of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore:

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

Section 88. Section 6.54.150 of the MCL is amended by deleting the section in its entirety and substituting the following in lieu therefore.

6.54.150 Revocation or suspension of license/permit.

> A. The board shall revoke a license for any of the following reasons:
>
> > 1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not mean any information which the applicant reasonably believed was correct;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence, should have known that licensee was employing, an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known that he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or

sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have know that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a 24 month period, not including any period of suspension. The fact that a the board's judgment is being appealed shall have no affect on the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous violations of TCA § 57-4-204 or Metropolitan Code § 7.24.030.

Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating TCA § 57-4-204 or Metropolitan Code § 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove on a defense to the alleged

violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54. T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 within a 24 month period, not including periods of suspensions, the license shall either be fined $500 or his/her licensee shall be suspended for a period no less than five (5) days and no longer than thirty (30) days or the licensee shall be both fined $500 and his or her license suspended for a period of not less than five (5) days and no longer than thirty (30) days.

3. Upon the second violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 within a 24 month period, not including periods of suspensions, the license shall be suspended no less than thirty-one (31) days and no longer than ninety (90) days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated Chapter 6.54 within a 24 month period not including any period of suspension. The fact that a the board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated T.C.A. Section 57-4-204 or

Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not mean any information which the applicant reasonably believed was correct;

2. The permittee has become ineligible to obtain a permit under 6.54.080(A);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying, access

to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four (24) months, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan

Code Section 7.24.030 within a twenty-four (24) month period, not including periods of suspensions, the permittee shall either be fined $500 or his or her permittee shall be suspended for a period no less than five (5) days and no longer than thirty (30) days or the permittee shall be both fined $500 and his or her permit suspended for a period of no less than five (5) days and no longer than thirty (30) days.

Upon the second violation of Chapter 6.54, T.C.A. Section 57-4-204 or Metropolitan Code Section 7.24.030 within a 24 month period, not including periods of suspensions, the permit shall be suspended no less than thirty-one (31) days and no longer than ninety (90) days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under 6.54.150(A)(7), (8) and 6.54.150(C)(7), (8) of this section.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting. The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. This has no effect, whatsoever, on the licensee's/permittee's right to appeal any revocation to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty (60) days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permitee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

Section 89. Section 6.54.160(2) of the MCL is amended by deleting the reference to § 6.54.150(B)" and substituting in lieu therefore "6.54.150(B) or (D)".

Section 90. Section 6.54.160(3) of the MCL is amended by deleting the reference to "6.54.150(A)" and substituting in lieu therefore "6.54.150(A) or (C)"

Section 91. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO FORM AND LEGALITY:

/s/ Shayna Abrams
Metropolitan Attorney

INTRODUCED BY:

/s/ Chris Ferrell

Members of Council

Amendment No. 1
to
Substitute Ordinance 99-1503

Mr. President,

I move to amend Substitute Ordinance 99-1503 as follows:

Section 1. Amend Section 2 of SO99-1503 amending section 6.54.010 of the Metropolitan Code of Nashville and

Davidson County ("MCL") by deleting Section 2 in its entirety and substituting the following therefore:

> Section 2. Section 6.54.010(C) "Crimes of a sexual nature" of the MCL is amended by adding the words "public indecency" after the words "means the crimes of rape, aggravated rape, aggravated sexual assault," and before the words "statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure,". Further 6.54.010(H) is amended by deleting the reference to "39-15-511" and substituting in lieu therefore the reference "39-13-511". Further 6.54.010(S) is amended by adding a new subsection "S" and renumbering the remaining subsections. The new subsection "S" shall read:
>
> > S. "Public Indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.
>
> Further 6.54.010(W) of the MCL is amended by deleting the definition of "Sexually oriented" in its entirety and substituting the following in lieu therefore:
>
> > W. "Sexually oriented" means any exhibition of any motion pictures, films, or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."

Section 2. Amend Section 12 of SO99-1503 amending Section 6.54.040(A)(5)(e) of the MCL by deleting Section 12 in its entirety and substituting the following therefore:

> Section 12. Section 6.54.040(A)(5)(e) of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore:
>
> f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years.

Section 3. Amend Section 23 of SO99-1503 amending section 6.54.040(C)(7) of the MCL by deleting Section 23 in its entirety and substituting the following therefore:

> Section 23. The first sentence of 6.54.040(C)(7) shall be amended by renumbering the subsection as subsection "9" and by deleting the first sentence in its entirety and substituting the following in lieu therefore:
>
> 9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this code section, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to comply with applicable statutes, ordinances and regulations.

Section 4. Amend Section 57 of SO99-1503 amending section 6.54.070(A)(4)(g) of the MCL by adding the following language to Section 57: "Further Section 6.54.070(A)(4)(g) is amended by deleting the word 'portrait' after the words 'Fingerprints and two' and before the words 'photographs at least two inches by two inches' in the first sentence."

Section 5. Amend Section 59 of SO99-1503 by deleting Section 59 in its entirety and substituting the following:

> Section 59. Section 6.54.070(C)(1) of the MCL is amended by deleting this section in its entirety and substituting the following in lieu therefore and renumbering the following paragraphs sequentially.
>
> 1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and determine if the applicant has not been convicted of a crime of a sexual nature, as defined in 6.54.010, has not had a similar type of permit/license revoked in the last two years is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.
>
> 2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting, then the permit shall be deemed approved and sent to the applicant

> by United States Mail to the address listed on the application.

Section 6. Amend Section 61 of SO99-1503 amending 6.54.070(C)(5) of the MCL by adding the following to the end of section 61:

> Further 6.54.070(C)(5) is amended by deleting the last sentence of that paragraph and substituting in lieu thereof the following sentence:
>
> > False or misleading information does not include information which the applicant reasonable believed, after exercising due diligence, was correct at the time of the application.

Section 7. Section 63 of SO99-1503 amending 6.54.070(D) of the MCL is amended by adding this sentence at the end of section 63:

> Section 6.54.070(D)(1)(c) of the MCL is amended by deleting the last sentence of the paragraph and substituting in lieu thereof the following sentence:
>
> > Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

Section 8. Section 68 of SO99-1503 amending 6.54.080(A)(3)(a) is amended by adding the following sentences at the end of Section 68:

> Section 6.54.080(A)(3)(a) of the MCL is further amended by deleting the last sentence of the paragraph and substituting in lieu thereof the following sentence:

> False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

Section 68 of SO99-1503 is further amended by adding the following sentence:

> Section 6.54.080(A)(3)(b) and (c) of the MCL is amended by deleting the word "longer" at the end of the both paragraphs and substituting in lieu therefore the word "later".

Section 9. Section 73 of SO99-1503 amending Section 6.54.110 is amended by adding the following as the first sentence of Section 73:

> Section 6.54.110(L)(3) of the MCL is amended by deleting the last sentence of the paragraph in its entirety and substituting in lieu thereof the following sentence:
>
> > Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

Section 10. Section 78 of SO99-1503 amending Section 6.54.130(D) is amended by adding the following as the first sentence of Section 78:

> Section 6.54.130(D) of the MCL is amended by deleting the first sentence of the paragraph in its entirety and substituting in lieu thereof the following sentence:
>
> > Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths,

> wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same.

Section 11. Section 88 of SO99-1503 is amended by deleting the amended language of Section 6.54.150(A)(1) in its entirety and substituting the following Section 6.54.150(A)(1):

> (A)(1). Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

Section 12. Section 88 of SO99-1503 is further amended by deleting the amended language of Section 6.54.150(C)(1) in its entirety and substituting in lieu thereof the following Section 6.54.150(C)(1):

> (C)(1). Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application

Section 13. Section 88 of SO99-1503 is further amended by deleting the last sentence of the amended

language in Section 6.54.150(E)(3) and substituting the following in lieu thereof:

> Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

Section 14. SO99-1503 is further amended by adding a new Section numbered "92" which shall read as follows:

> Section 92. Section 6.54.020(F) of the MCL is amended by adding the word "civil" after the words "which inspectors shall not hold any" and before the words "service status."

INTRODUCED BY:

/s/ Chris Ferrell
Member of Council

ADOPTED: February 16, 1999

ORDINANCE NO. O99-1814

An ordinance to amend Title 6, Chapter 8.54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

Now therefore, be it enacted by the Metropolitan Council of Nashville and Davidson County as follows.

Section 1. Sections 6 54 010 is amended by adding a definition for the term "Booth" which shall be incorporated into the definitions in accordance with the definitions alphabetical organization and re-lettering any subsequent definitions accordingly

"Booth" means any booth, cubicle, stall, room or compartment which is designed, constructed or used to hold or seat patrons/customers and is designed such that the booth is separated from the common area or the premises and is used for presenting sexually oriented entertainment including, but not limited to viewing sexually oriented moving pictures or viewing sexually oriented publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by patrons therein "Booth" shall not mean a room or enclosure that is designed, constructed and regularly used to seat more than ten persons

Section 2. Section 6.54 010(O) of the MCL is amended by deleting the definition of "Operator" in its entirety and substituting the following in lieu therefore.

"Operator" means any person, partnership, limited partnership, joint venture, corporation or any other type of

business entity operating, conducting or maintaining a sexually oriented business

Section 3. Section 6 54.010(X) of the MCL is amended by amending the definition of "Sexually oriented" by inserting a (1) after the word "means" and before the words "any exhibition" and by inserting a (2) after the word "or" and before the words "any live performance"

Section 4. Section 6.54.010(Y) of the MCL is amended by amending the definition of "Sexually oriented business establishment" by deleting the last sentence.

Section 5. Section 6.54.010(Y)(3) of the MCL is amended by amending the definition of "Sexually oriented theatre" by deleting the word "building" after the word "enclosed" and before the word "regularly" and inserting in lieu thereof the words "area, not including a booth".

Section 6 Section 6 54 020(C) of the MCL is amended by adding the following sentence at the end of the paragraph. "The vice-chair is authorized to act in the place of the chair and in the same capacity as the chair when the chair is unavailable"

Section 7. Section 6 54 020 (D)(2) of the MCL is amended by deleting this subsection in its entirety and substituting in lieu therefore the following "A quorum shall mean that two members of the board are present at the meeting A quorum is required for the purpose of transacting business"

Section 8 Section 6 54 030(B) of the MCL is amended by deleting this subsection in its entirety and substituting in lieu therefore the following

B Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity which desires to operate more than one sexually oriented business/establishment must have a license for each sexually oriented business/establishment

Section 9 Section 6 54 040(A)(1) of the MCL is amended by deleting the first sentence in its entirety and substituting in lieu therefore "Any person, partnership, joint venture corporation or any other type of business entity desiring to secure a license shall make application to the board."

Section 10. Section 6.54.040(A)(4) is amended by deleting this subsection in its entirety and substituting the following in lieu therefore

The following persons must be listed in the license application for any sexually oriented business that is a corporate entity of any kind the registered agent and the name and address of all officers and directors of the corporation and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation and management of the business The following person must be listed in the license application for any sexually oriented business that is a partnership, limited partnership, joint verdure, or any other type of business the name and address of all persons who will be involved in the day-to-day operation and management of the business.

Section 11 Section 6 54 040(A)(5)(c) of the MCL is amended by deleting this subsection in its entirety and substituting in lieu therefore

Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business/adult entertainment license/permit Whether the applicant has ever had such a license/permit revoked or suspended within the last year from the date of application the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation

Section 12 Section 6 54 040(A)(5)(f) is amended by deleting the subsection in its entirety and enacting a new subsection (f) as follows

All Judgements by a court within one year for violations of the metropolitan zoning Section 167 64 260

Section 13. Section 6 54.040(A)(5)(k) of the MCL is amended by deleting the subsection in its entirety and substituting the following in lieu therefore

k A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate

Section 14. Section 6 54 040(A)(6) is amended by deleting the subsection and adding a new subsection as follows

The applicant shall provide the board with his/her application, a diagram, drawn to scale of the premises, including the location and layout of all booths and stages and the location of the clerk/manager's stand or counter Though the diagram shall be drawn to scale, it does not have to be professionally prepared

Section 15 Section 6.54.040(A) is amended by adding a new subsection as follows

If any of the information on the application changes over the course of the time the license is issued, including any changes in the physical layout of the premises, the licensee shall inform the board, in writing, of the changee

Section 16. Section 6 54 040(B)(1) is amended by adding the words and figures "6.54 050 (A)(3) and 6.54 130(C)" after-the numbers "6 54 050(A)(1) and before the words "of this chapter" in the first sentence Section 6 54.040(B)(1) of the MCL is further amended by deleting the last sentence of that paragraph and substituting in lieu therefore the following:

Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no violations of applicable statutes ordinances, or regulations, no violations of the provisions of this chapter, no sexually oriented business/adult entertainment zoning code violations and/or no applicable criminal history

Section 17 Section 6.54.040(B)(2) of the MCL is amended by deleting the subsection in its entirety and enacting a new subsection as follows.

The code department shall confirm that any booths or stages conform with the submitted diagram and the requirements set out in Sections 6.54.050(A) and 6 54 130

Section 18 Section 6.54 040(C)(1) is amended by deleting the word "code section" before the words "and the applicable health statutes" and after the words "applicant is in

compliance with this" and substituting in lieu therefore the word "chapter".

Section 19 Section 6 54 040(C)(2) is amended by adding the words "this chapter" after the words "If the board determines that the applicant is in compliance with" and before the words "the applicable health statutes, ordinances and regulations,"

Section 20 Section 6 54 040(C)(3) of the MCL is amended by deleting it in its entirety and substituting the following in lieu therefore

3. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two (2) days of the events described in this paragraph.

Section 21 Section 6.54.040(C)(4) of the MCL is amended by deleting the words and figures "Section 6 54 050(B)(2)" before the words "such denial" and substituting the words "the provision of this chapter

Section 22. Section 6.54 040(C)(5) of the MCL is amended by deleting the word "until the judgement is reversed" in the last sentence of the section and substituting the words "unless the judgement is stayed"

Section 23 Section 6 54.040(C)(7) of the MCL is amended by deleting the words "a diagram is required under subsection (A)(6) of this section and based or the code inspection" at the beginning of the first sentence and is further amended by adding the word and numbers "or 6 54 130 before the words "or the submitted diagram"

Section 24 Section 6.54.040(C)(9) of the MCL is amended by deleting the words "code section" and substituting in lieu therefore the word "chapter" after the words "if the board shall determine that the applicant is not in compliance with this" and before the words "the zoning code or the applicable health statutes, ordinances and regulations"

Section 25. Section 6.54.040(C)(11) of the MCL is amended by deleting the last sentence of the section

Section 26 Section 6 54 040(D)(1) of the MCL is amended by deleting the words "under subsection (C)(5) or (C)(7) of this section" after the word "denied" and before the words "the applicant may reinstate"

Section 27 Section 6 54 040(D)(1)(a) of the MCL is amended by deleting the words "described in subsection (C)(5) or (C)(7) of this section" after the word "denial" and before the words "to cure the violation"

Section 28. Section 6.54.040(D)(1)(e) of the MCL is amended by deleting the following words at the end of the subsection, "in accordance with subsection (C)(5) or (C)(7) of this section" and by deleting the word "is" and substituting in lieu therefore the words "will be" after the words "code violations have not been corrected, then the application" and before the word "denied" at the end of that subsection.

Section 29 Section 6 54 040(D)(2) of the MCL is amended by deleting the following words at the end of the subsection, "in accordance with subsections (C)(5) (C)(7) or (D)(3) of this section"

Section 30. Section 6.54.040(D)(2)(a) of the MCL is amended by deleting the word "five" and substituting the

word "fifteen" and by deleting the following words at the end of the subsection, "described in subsection (C)(5) or (C)(7) of this section

Section 31 The last sentence of Section 6 54.040(D)(3) of the MCL is amended by adding the word "initial" after the words "an extension of time have passed, the" and before the word "denial" and by deleting the words "described in subsections (C)(5) and (C)(7) of this section" after the word "denial" and before the words "shall be treated as a denial of the application"

Section 32. Section 6.54.040(E)(1) is amended by adding a new subsection

f If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two (2) days of that specified time period

Section 33. Section 6.54.050(A)(1)(c) of the MCL is amended by deleting the section

Section 34. Section 6.54.050(A) is amended by adding a new subsection as follows:

3. Any live performance of sexually oriented entertainment shall occur upon a stage at least 18 inches above the immediate floor level and removed at least 3 feet from the nearest customer A three foot boundary from the outer edge of the stage shall be indicated on the floor by a rail barrier, lighting, luminous tape or paint, or any other method which will make the boundary visible in a darkened condition so that the customer will not invade the 3

foot boundary from the stage with any portion of his/her body

Section 35. Section 6 54 050(B) of the MCL is amended by deleting paragraph 6 in its entirety and substituting the following,

6 Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed

Section 36 The last sentence of Section 6 54 050(B) is amended by deleting the word "permitted" and substituting in lieu therefore the word "described" after the words "until a permit is granted except as" and before the words "in Section 6.54.070(D)(4)"

Section 37 Section 6 54 060 is amended by adding a new subsection as follows

C Any entertainer found to have violated this chapter by providing sexually oriented entertainment in a sexually oriented business/establishment in the metropolitan area without a permit as evidenced by a judgement of a court within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on

the disqualification of the applicant unless the judgement is stayed

Section 38 Section 6.54 070(A)(2)(a) of the MCL is amended by adding the word "his" before the words "her application, including one of the two photos to the police department" after the words "The police department may be notified of a need for a background check in two ways The applicant brings" and further adding the word "his" before the words "her fingerprints taken at the police department" and after the words "including one of the two photos to the police department and has"

Section 39 Section 6 54 070(A)(2)(b) of the MCL is amended by deleting the words "or other qualified person," at the end of that subsection and further amended by adding the following at the end of the section

If the applicant intends to mail his/her application to the board then he/she shall have his/her local law enforcement agency take his/her fingerprints and photograph and that law enforcement agency shall mail the fingerprints directly to the Metropolitan Police Department.

Section 40. The first full sentence of Section 6.54 070(A)(2)(c) of the MCL is amended by adding the word "his" after the words "Fees If the applicant brings" and before the words "her application to the police department," and further by deleting the second to last sentence in its entirety and substituting the following sentence

This same procedure applies if the applicant has his/her fingerprints and photographs taken by their local law enforcement agency and mailed directly to the Metropolitan Police Department

Section 41. Section 6.54 070(A)(4)(e) is amended by deleting the paragraph in its entirety and substituting in lieu therefore the following.

Whether the applicant previously entertained in this or any other county, city or state under a sexually oriented business license/permit or similar business license/permit within the last year For whom the applicant was employed or associated at the time Whether the applicant has had such a license/permit revoked or suspended within the last year and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation.

Section 42 Section 6.54 070(A)(4)(h) of the MCL is amended by deleting the subsection in its entirety and substituting the following in lieu therefore

A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate

Section 43. Section 6.54 070(B) of the MCL is amended by deleting the words "either by performing these functions or by reviewing these items which were provided by the applicant" before the words "and by performing a background investigation for crimes of a sexual nature" and after the words "fingerprints and 2 x 2 photo" and is further amended by deleting the words and numbers "Subject to Section 6 54 150"

Section 44. Section 6.54 070(C)(1) is amended by deleting the first sentence in its entirety and substituting in lieu therefore the following:

Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and if it determines that the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6 54 010, has not had a similar type of permit/ license revoked in the last year, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit

Section 45 Section 6 54 070(D)(1) of the MCL is amended by adding a new subsection

f If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two (2) days of that specified time period.

Section 46. Section 6 54 070(E) of the MCL is amended by deleting paragraph 3 and substituting a new paragraph as follows

3 The date the permit was issued.

Section 47. Section 6.54.050(A) of the MCL is amended by adding a new subsection as follows.

5 Any applicant found to have previously violated this chapter of the metropolitan code by providing sexually oriented entertainment within the metropolitan area without a permit as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement The fact that a trial court's judgement is being appealed shall have no effect on the

disqualification of the applicant unless the judgement is stayed

Section 48 Section 6.54.130 of the MCL is amended by adding a new section after (D) and by renumbering the sections accordingly as follows:

Live sexually oriented entertainment shall not be permitted in booths

Section 49. Section 6 54.140(C) of the MCL is amended by adding the words "The distance shall be measured three (3) feet from any outer edge/side of the stage

Section 50. Section 6 54 140 of the MCL is amended by adding three new subsections as follows:

Only one individual shall occupy a booth at anytime No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth No individual shall damage or deface any portion of the booth

Live sexually oriented entertainment shall not be permitted in booths

No customer shall invade the 3 foot boundary from the outer edge of the stage as required to be designated by Section 6.54 050(A)(3)

Section 51 Section 6 54 160(B) shall be amended by deleting the words "A fine" at the beginning of the second sentence and substituting in lieu therefore the words "The five hundred dollar penalty"

Section 52 This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it

Sponsored By. Chris Ferrell

LEGISLATIVE HISTORY

Introduced: July 20 1999

ORIGINAL

METROPOLITAN COUNTY COUNCIL

SECOND SUBSTITUTE

Bill No. BL99-61

An ordinance to amend Title 6, Chapter 6.54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

(Filed Dec. 7, 1999)

Introduced _____

Passed first Reading _____

Referred to _____

~~*Amended*~~ SUBSTITUTE BILL INTRODUCED & DEFERRED DEC 7 1999

Passed second Reading DEC 21 1999

Referred to _____

Passed third Reading JAN 19 2000

Approved JAN 20 2000

By [Illegible]
Metropolitan Mayor

Departments Notified _____

Advertised _____

Second Substitute Bill No. BL99-61

An ordinance to amend Title 6, Chapter 6 54 of the Metropolitan Code of Laws concerning sexually oriented businesses.

Whereas, the United States District Court for the Middle District of Tennessee, Nashville Division held in the matter of *Déjà vu et al v. the Metropolitan Government et al.,* Docket Numbers 3-97-1066 and 3-97-1176, that the plaintiffs are likely to be successful on their challenge to the sections of the ordinance barring a sexually oriented business from obtaining a license for a period of years because the operator of the business was convicted of the crime of obscenity and the court believes that this prohibition is unconstitutional; and,

Whereas, the United States District Court also held that the plaintiffs are likely to be successful on their challenge to the sections of the ordinance requiring a criminal background investigation of the operators of sexually oriented businesses and entertainers engaged in sexually oriented entertainment because these sections are unconstitutional and they involve an investigation into whether or not the operator or entertainer has been convicted of the crime of obscenity; and,

Whereas, the United States District Court also held that the plaintiffs are likely to succeed on their challenge to the section of the ordinance requiring a fee to obtain a license to operate a sexually oriented business or entertain in a sexually oriented business because that fee includes the cost of a criminal background check of the applicant to determine whether or not that applicant has been convicted of the crime of obscenity and that portion of the fee is unconstitutional; and,

Whereas, the United States District Court held that the plaintiffs are likely to succeed on the merits of their claim that the definition of the terms "sexually oriented" and "sexually oriented theater" were overly broad even though the definitions of the terms "sexually oriented nightclub" and "sexually oriented entertainment" were held to be constitutional and not overly broad by the Court; and

Whereas, though the Metropolitan Government does not concede that barring applicants from obtaining a sexually oriented license or permit because of a prior conviction for the crime of obscenity is unconstitutional, that to conduct a criminal background check to discover if an applicant has been convicted of the crime of obscenity is unconstitutional, that charging the applicants the cost of a criminal background check to discover if the applicants have been convicted of the crime of obscenity is unconstitutional or that the definitions of the terms "sexually oriented" and "sexually oriented entertainment" were overly broad; and

Whereas, it is the Metropolitan Government's objective to resume regulation of the sexually oriented businesses within its jurisdiction without the delays that would most likely occur if the United States District Court's temporary injunction order were appealed; and

Whereas, amending the ordinance to comply with the most recent ruling of the United States District Court will give the Metropolitan Government the opportunity to move to dissolve the temporary injunction and proceed with enforcement of its ordinance as quickly as possible, the following amendments are proposed.

Now therefore, be it enacted by the Metropolitan Council of Nashville and Davidson County as follows:

Section 1. Sections 6.54.010(D) of the Metropolitan Code of Laws (hereinafter "MCL") as amended by 099-1814 is amended by deleting the word "obscenity" from the definition of "Crimes of a sexual nature" before the words "or crimes committed in a jurisdiction" and after the words "patronizing prostitution, promoting prostitution."

Section 2. Section 6.54.010(O) of the MCL as amended by 099-1814 is amended by deleting this subsection in its entirety.

Section 3. Section 6.54.010(Y) of the MCL as amended by 099-1814 is amended by deleting this subsection in its entirety and substituting in lieu therefore the following:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture videocassette, slides or other photographic reproduction that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Section 4. Section 6.54.010(Z)(3) of the MCL as amended by 099-1814 is amended by deleting this subsection in its entirety and substituting the following in lieu therefore:

3. "Sexually oriented theater" is an enclosed building in which films, motion pictures, videocassettes, slides, or other photographic reproductions that are distinguished or characterized by an emphasis on depictions of "specified sexual activities" or "specified anatomical areas," as defined in this section, are regularly presented for observation by patrons therein.

Section 5. Section 6.54.010 of the MCL as amended by 099-1814 is amended by adding a new definition and renumbering this subsection as appropriate.

"Sexually oriented material" shall mean "sexually oriented entertainment" and/or any material, including films, movies, motion pictures, videocassettes, slides, or other photographic reproductions, which regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Section 6. Section 6 54.090 of the MCL as amended by 099-1814 is amended by deleting the words "five hundred" and substituting in lieu therefore the words "three hundred fifty" after the words "A license fee of" and before the words "dollars shall be submitted with the application" and by deleting the words "one hundred" and substituting in lieu therefore the word "fifty" after the words "A permit fee of" and before the words "dollars shall be submitted with the application".

Section 7. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

APPROVED AS TO FORM AND LEGALITY:

/s/ Shayna Abrams
Metropolitan Attorney

INTRODUCED BY:

/s/ Chris Ferrell

Members of Council

Chapter 6.54

SEXUALLY ORIENTED BUSINESSES

Sections:

6.54.010 Definitions.

6.54.020 Sexually oriented business licensing board.

6.54.030 License required.

6.54.040 Application for license.

6.54.050 Standards for issuance of license.

6.54.060 Permit required.

6.54.070 Application for permit.

6.54.080 Standards for issuance of a permit.

6.54.090 Fees.

6.54.100 Display of license or permit.

6.54.110 Renewal of license or permit,

6.54.120 Hours of operation.

6.54.130 Responsibilities of the operator.

6.54.140 Prohibitions and unlawful sexual acts.

6.54.150 Revocation or suspension of license/ permit.

6.54.160 Penalties and prosecutions.

6.54.170 Invalidity of part.

6.54.010 Definitions.

For the purpose of this chapter, the words and phrases used in this chapter shall have the following meanings, unless otherwise clearly indicated by the context:

A. "Aggravated rape" means as defined in the Tennessee Code Annotated Section 39-15-502.

B. "Aggravated sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-504.

C. "Booth" means any booth, cubicle, stall, room or compartment which is designed, constructed or used to hold or seat patrons/customers and is designed such that the booth is separated from the common areas of the premises and is used for presenting sexually oriented entertainment including, but not limited to viewing sexually oriented moving pictures or viewing sexually oriented publications by any photographic, electronic, magnetic, digital or other means or medium (including, but not limited to, film, video or magnetic tape, laser disc, cd-rom, books, magazines or periodicals) for observation by patrons therein. "Booth" shall not mean a room or enclosure that is designed, constructed and regularly used to seat more than ten persons.

D. "Crimes of a sexual nature" means the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

E. "Current entertainer" means an entertainer performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

F. "Employee" means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of a sexually oriented business.

G. "Entertainer" means any person who provides live entertainment within a sexually oriented business as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

H. "Existing sexually oriented business," means a sexually oriented business that is operating within the metropolitan area as of March 1, 1999.

I. "Indecent exposure" means as defined in the Tennessee Code Annotated Section 39-13-511.

J. "Location" means a single site for which only one use and occupancy permit would be required.

K. "Metropolitan area" means the general services district of the metropolitan government of Nashville and Davidson County.

L. "Metropolitan council" means the legislative body of the metropolitan government of Nashville and Davidson County, Tennessee.

M. "New entertainer" means an entertainer not performing sexually oriented entertainment within the metropolitan area as of March 1, 1999.

N. "New sexually oriented business" means a sexually oriented business not in operation as of March 1, 1999.

O. Deleted.

P. "Operator" means any person, partnership, limited partnership, joint venture, corporation or any other type of business entity operating, conducting or maintaining a sexually oriented business.

Q. "Patronizing prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

R. "Promoting prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

S. "Prostitution" means as defined in the Tennessee Code Annotated Section 39-13-512.

T "Public indecency" means as defined in the Tennessee Code Annotated Section 39-13-511.

U. "Rape" means as defined in the Tennessee Code Annotated Section 39-15-503.

V. "Rape of a child" means as defined in the Tennessee Code Annotated Section 39-15-522.

W. "Sexual battery" means as defined in the Tennessee Code Annotated Section 39-15-505.

X. "Sexual exploitation of a minor" means as defined in the Tennessee Code Annotated Sections 39-17-1003, 39-17-1004 and 39-17-1005.

Y. "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions means a film, movie, motion picture videocassette, slides or other photographic reproduction that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing

"specified sexual activities" or "specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Z. "Sexually oriented business/establishment" means any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

1. "Sexually oriented bookstore" means an establishment having a majority of its stock in trade or a majority of its floor space in books, magazines, other periodicals, or any other items which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

2. "Sexually oriented nightclub" means a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which regularly features live performances that are characterized by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

3. "Sexually oriented theater" means an enclosed building in which films, motion pictures, videocassettes,

slides, or other photographic reproductions that are distinguished or characterized by an emphasis on depictions of "specified sexual activities" or "specified anatomical areas," as defined in this section, are regularly presented for observation by patrons therein.

4. "Sexually oriented video store" means a commercial establishment having a majority of its stock or a majority of its floor space dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

a. "Sexually oriented videos" means a video, CD, laser disk, or similar medium with a cover that depicts "specified sexual activities" or "specified anatomical areas" or a transparent or less than opaque cover through which "specified sexual activities" or "specified anatomical areas" can be viewed.

AA. "Sexually oriented entertainment" means the regular presentation, for a fee or incidentally to another service, of material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

BB. "Sexually oriented material" means "sexually oriented entertainment" and/or any material, including films, movies, motion pictures, videocassettes, slides, or other photographic reproductions, which regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities" or "specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

CC. "Specified anatomical areas" means:

1. Less than completely and opaquely covered;

a. Human genitals, pubic region,

b. Buttocks,

c. Female breasts below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely opaquely covered.

DD. "Specified sexual activities" means:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

EE. "Statutory rape" means as defined in the Tennessee Code Annotated Section 39-15-506. (Ord. BL99-61 §§ 1-5, 2000; Ord. 99-1814 §§ 1-5, 1999; Amdt. 1 § 1 with Ord. 99-1503 §§ 1-3, 1999; Ord. 97-1022 § 1, 1997;

amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 3 §§ 1 and 2 with Ord. 97-796 § 2 (part), 1997)

6.54.020 Sexually oriented business licensing board.

A. Establishment. A sexually oriented business licensing board is created and designated the metropolitan sexually oriented business licensing board (herein "board").

B. Membership – Terms.

1. The board shall consist of five members, who shall have been residents of the metropolitan area for not less than one year, and who shall continue to be eligible so long as they reside in the metropolitan area, to be appointed by the mayor and confirmed by a majority vote of the metropolitan council.

2. At least one of the five members shall be an attorney, and one of the five members shall be a health provider.

3. Of the five members first appointed, two shall be appointed for a term of two years, and two shall be appointed for a term of three years, and one shall be appointed for a term of four years. Thereafter, each member shall be appointed for a term of four years, and shall serve until his/her successor is appointed. Any vacancy other than the expiration of terms shall be filled for the unexpired term.

C. Election of Officers – Term. The board shall organize by the election of a chair and a vice-chair, who shall serve for a period of one year or until a successor shall have been chosen. The vice-chair is authorized to act

in the place of the chair and in the same capacity as the chair when the chair is unavailable.

D. Meetings – Quorum Required – Minutes and Transcript.

1. The board shall hold two regular meetings each month at a time fixed by the board, and may hold such special meetings as may be necessary.

2. The attendance of at least a majority of the members of the board, not including unfilled positions, shall be required to constitute a quorum for the purpose of transacting business.

3. Minutes shall be kept of the meetings in permanent form and a record shall be kept of the action of the board with respect to every application for a license and/or a permit. The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits.

4. No transcript of the proceedings had before the board shall be in any form other than narrative, unless the board shall have been requested to provide for an exact copy of the testimony by an interested party at least twenty-four hours prior to a board meeting. The cost of an exact copy shall be borne by the person requesting the same.

E. Powers and Duties.

1. The board shall have jurisdiction over the licensing, regulating and controlling of all sexually oriented establishments as provided in this chapter, located in the metropolitan area.

2. The board may promulgate such bylaws, rules and regulations not inconsistent with state law, the Metropolitan Charter, or any ordinance, as it deems appropriate for the conducting of its business.

3. The board has the authority to subpoena witnesses to testify before the board.

F. Inspectors – Authority. The board is empowered to employ suitable person(s) as inspectors which inspectors shall not hold any civil service status. The board shall prescribe the duties of such inspectors so as to enforce the applicable provisions of this title.

G. Procedures for Hearings. This section shall apply to all hearings by the board including but not limited to hearings for revocation, suspension or denial of a license/permit.

1. Upon receiving a written request for a hearing, the board shall send the party requesting the hearing a notice stating the time and place of the hearing and the right to be represented by counsel.

2. At the hearing, the party requesting the hearing shall appear on his/her own behalf or be represented by counsel. All witnesses shall be sworn. The chair shall allow the party requesting the hearing to present witnesses on his/her own behalf and to cross-examine all witnesses testifying against him/her.

3. All decisions of the board shall be in writing, setting forth the findings of the board, and shall be signed by the chair or vice-chair.

4. Minutes shall be kept of all proceedings before the board in permanent form and a record shall be kept of the actions of the board with respect to all hearings.

5. A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. The record must be maintained by the board for a period of ninety days. Such record or any part thereof shall be transcribed at the request of any party at such party's expense.

6. The board will arrange for a court reporter to be present at any hearing after an initial adverse administrative decision. (Amdt. 1 with Ord. 99-1814 § 6, 1999; Amdt. 1 § 14 with Ord. 99-1503, 1999; Ord. 97-1022 § 3, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.030 License required.

A. Except as provided in subsection F of this section, from and after March 1, 1999, no sexually oriented business shall be operated or maintained within the metropolitan area without first obtaining a license to operate issued by the board.

B. Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity which desires to operate more than one sexually oriented business/establishment must have a license for each sexually oriented business/establishment.

C. Only one license may be issued for each sexually oriented business location.

D. No license or interest in a license may be transferred to any person, partnership or corporation.

E. It is unlawful for any entertainer or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business. It is unlawful for any employee to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed sexually oriented business while sexually oriented entertainment is being presented.

F. All existing sexually oriented businesses, as defined in Section 6.54.010, must submit an application for a license by March 15, 1999, or cease operations. All existing sexually oriented businesses which apply for a license by March 15, 1999, may continue to operate the sexually oriented business described in the application even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.040(E)(3). All new sexually oriented businesses, as defined in Section 6.54.010, may submit an application at any time but may not operate until a license is granted except as permitted in Section 6.54.040(E)(4).

G. Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 7, 8, 1999; Ord. 99-1503 §§ 4, 5, 1999; Ord. 97-1022 § 5, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.040 Application for license.

A. Application.

1. Any person, partnership, limited partnership, joint venture, corporation or any other type of business entity desiring to secure a license shall make application to the board. The applicant shall file the original application with six copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to: the police department, the department of codes administration, the health department, and the applicant.

2. Application forms shall be available at the office of the board.

3. The application form shall include all the information indicated in subdivisions (5)(a) through (5)(I) of this subsection.

4. The following persons must be listed in the license application for any sexually oriented business that is a corporate entity of any kind: the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation and management of the business. The following persons must be listed in the license application for any sexually oriented business that is a partnership, limited partnership, joint venture, or any other type of business: the name and address of all persons who will be involved in the day-to-day operation and management of the business.

5. The applicant shall furnish the following information under oath:

a. Name and address of the applicant, including all aliases (business address is sufficient);

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. Whether the applicant previously operated in this or any other county, city or state under a sexually oriented business/adult entertainment license/permit. Whether the applicant has ever had such a license/permit revoked or suspended, within the last year from the date of application, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation;

e. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

f. All judgements by a court within one year for violations of the metropolitan zoning Section 17.64.260;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

h. The address of the sexually oriented business to be operated by the applicant;

i. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all officers and directors of the corporation, and any stockholder holding a majority controlling percentage of the stock of a corporate applicant and who will be involved in the day-to-day operation of the business;

j. If the applicant is a partnership, joint venture, or any other type of business, the application shall specify the name and address of all persons who will be involved in the day-to-day operation of the business;

k. A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate.

6. The applicant shall provide the board with his/her application, a diagram, drawn to scale of the premises, including the location and layout of all booths and stages and the location of the clerk/manager's stand or counter. Though the diagram shall be drawn to scale, it does not have to be professionally prepared.

7. If any of the information on the application changes over the course of the time for which the license is issued, including any changes in the physical layout of the premises, the licensee shall inform the board, in writing, of the changes.

B. Inspections and Investigations.

1. The codes department shall, upon receipt of a copy of the application, inspect the premises to insure that the establishment complies with the unique physical layout requirements set out in Section 6.54.050(A)(1), 6.54.050 (A)(3) and 6.54.130(C) of this chapter. The health department shall inspect the premises to insure compliance with applicable health code statutes, ordinances, and regulations. The police department shall investigate the applicant's criminal history collecting the applicant's fingerprints and 2 x 2 photo either by performing these functions or by reviewing these items which were provided by the applicant and by performing a background investigation for crimes of a sexual nature. The results of both the inspections and the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any inspection or investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving the license and shall be treated by the board as if the report revealed no violations of applicable statutes, ordinances, or regulations, no violations of the provisions of this chapter, no sexually-oriented business/ adult entertainment zoning code violations and/or no applicable criminal history.

2. The code department shall confirm that any booths or stages conform with the submitted diagram and the requirements set out in Sections 6.54.050A and 6.54.130.

3. The police department shall complete its investigation and the codes department and health department shall complete their respective inspections and shall

communicate the results to the board in writing within twenty days of receipt of the application. The written investigation from the codes department and health department shall end with substantially one of the following statements:

> The location at ___ complies with Chapter 6.54 and the applicable health code sections of the metropolitan code.
>
> The location at ___ does not comply with Chapter 6.54 and the applicable health code sections of the metropolitan code. It is in violation of the following provisions: Section numbers of code violations.

The writing from the police department shall end with substantially the following statement:

> The police department's criminal record check indicates that the persons listed on the application have/have not committed a crime of a sexual nature within the past five years. The persons listed on the application have committed the following crimes of a sexual nature:
>
> Name Crime Date

4. If the building/structure has a valid use and occupancy permit, the applicant shall provide the board with a copy of the valid use and occupancy permit which shall be made part of the file.

C. Board Action on Inspection and Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department

and the inspections by the codes department, and health department the board will meet and determine if the applicant is in compliance with this chapter and the applicable health statutes, ordinances and regulations.

2. If the board determines that the applicant is in compliance with this chapter, the applicable health statutes, ordinances and regulations, and the applicant has not committed a crime of a sexual nature, as defined in Section 6.54.010, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application, then the board shall grant the license. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

3. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of the events described in this paragraph.

4. In the event the board denied the application in accordance with the provisions of this chapter, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation and inspections.

5. If it is determined by the board, using the application and the inspection reports that the applicant has violated the provisions of the zoning code applicable to sexually oriented/adult entertainment businesses within the past two years, then the applicant is ineligible for a

license for one year from the date the citation was sustained. A violation of the zoning code shall be evidenced by a judgement of a court. The fact that the judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgment is stayed.

6. Any investigation reports or inspection reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her license and shall be treated by the board as if that department approved the application.

7. If the board determines that the actual structure does not comply with Section 6.54.050(A) or the submitted diagram, then the applicant is not in compliance with this code section and the license shall be denied in accordance with Section 6.54.050(A) and (B).

8. If in the course of the investigation it is discovered any false or misleading statement or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.050(B)(3). False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

9. Within fifteen days of receiving the results of the investigation conducted by the police department, and inspection reports from the codes department, and health department, if the board shall determine that the applicant is not in compliance with this chapter, the zoning code or the applicable health statutes, ordinances and regulations, the applicant shall be notified in writing, the next business day, that the license is denied for failing to

comply with applicable statutes, ordinances and regulations. This notice shall specify the violation. If the applicant can come into compliance as described in subsection D of this section, the denial shall not take effect. The notice shall also specify that the applicant may request a hearing within five days, cure the violation within fifteen days and request reinspection or request an extension of time.

10. The board has the discretion to hold any application for further investigation if: (a) the initial investigation requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days, from the end of the initial fifteen days specified subsection (C)(1) of this section, unless otherwise agreed to by the applicant.

11. Wherever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

12. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his/her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his/her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such license and shall be grounds for denial

thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(10) of this section.

D. Extensions of Time for the Applicant.

1. If the license is denied, the applicant may reinstate his/her application by notifying the board in writing that he/she has come into compliance and requests reinspection.

a. The applicant has fifteen days from the mailing of the denial to cure the violation and notify the board or to request an extension pursuant to subsection (D)(2) of this section. The applicant has the responsibility to contact the board.

b. Once contacted, the board shall notify the appropriate inspector the next business day that the applicant believes he/she has come into compliance.

c. Upon notification by the board, the appropriate inspector shall return to the location for reinspection and shall submit another written report as indicated in subsection (B)(3) of this section. The inspector has five days from the date he/she was notified by the board to reinspect the premises and inform the board as to whether the applicant has come into compliance in the same manner described in subsection (B)(3) of this section and using the same language required in subsection (B)(3) of this section.

d. Based on the report of the inspector(s), the board shall determine if the applicant has come into compliance, and if so the board shall issue the license at the next regular meeting. The next meeting shall be held no later than fifteen days after the inspection report is filed with

the board. Any inspections not filed with the board in the time period specified in this section will be treated as described in subsection (C)(6) of this section.

e. If the applicant fails to either contact the appropriate inspector to report that the code violations have been corrected, or if the code violations have not been corrected, then the application will be denied.

2. If the process of curing the violation requires more time than that provided in subsection (D)(1) of this section. the applicant may request an extension from the board. If the applicant does not make such a request in the time allotted, the application is denied.

a. The request for an extension must be made in writing within fifteen days from the denial.

b. The board shall hear the applicant's request for an extension at the next regular meeting. The next meeting shall be held no later than fifteen days after the request for the extension is received by the board.

c. The hearing on the extension shall follow the same rules as set out in Section 6.54.020(G) except that the decision of the board shall grant or deny the extension and a decision to grant an extension shall take effect immediately.

d. An extension shall only be granted when the codes inspector and the health inspector agree that an extension will not endanger the health or safety of the community and the board determines that the applicant has demonstrated a good faith effort to make the necessary repairs or cure the violation(s) in a timely manner.

3. If the applicant fails to follow the procedure set out in this subsection then the application is denied and the applicant must reapply to obtain a license. Following the procedure set out in subsections (D)(1) or (D)(2) of this section requires no additional fees. Once the deadlines to cure the violation or ask for an extension of time have passed, the initial denial shall be treated as a denial of the application.

E. Denial of the License Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's notification.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

f. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the license shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of that specified time period.

2. Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For an existing sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). Adverse administrative decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new sexually oriented business, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a license shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the license then that license shall be revoked in accordance with Section 6.54.150(A)(8). (Ord. 99-1814 §§ 9 – 32, 1999; Amdt. 1 §§ 2, 3 with Ord. 99-1503 §§ 6 – 30, 1999; Ord. 97-1022 §§ 6 – 39, 1997; amended during 9-97 supplement; Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.050 Standards for issuance of license.

A. Physical Layout of Sexually Oriented Business.

1. Any sexually oriented business having available for customers, patrons or members any booth, for the viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos, shall submit a diagram under Section 6.54.040(A)(6) and the diagram submitted must be substantially the same as the structure observed by the inspector. Further, the structure and the diagram shall comply with the following requirements:

a. Access. Each booth shall be totally accessible to and from aisles and public areas of the sexually oriented business and shall be unobstructed by any door, gate, lock or other control-type devices.

b. Construction. Every booth shall meet the following construction requirements:

i. Each booth shall be separated from adjacent booths and any nonpublic areas by a solid or opaque wall;

ii. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same;

iii. All walls shall be solid and without any openings, extended from the floor to a height of not less than six feet and be light colored, nonabsorbent, smooth textured and easily cleanable;

iv. The floor must be light colored, nonabsorbent, smooth textured and easily cleanable; and

v. The lighting level of each booth shall be a minimum of ten footcandles at all times as measured from the floor.

2. The provisions enunciated in subdivision 1 of this subsection shall not apply to bathrooms unless the bathroom contains any equipment which would allow the viewing of sexually oriented films, sexually oriented movies, sexually oriented videos.

3. Any live performance of sexually oriented entertainment shall occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer. A three-foot boundary from the outer edge of the stage shall be indicated on the floor by a rail, barrier, lighting, luminous tape or paint, or any other method which will make the boundary visible in a darkened condition so that the customer will not invade the three-foot boundary from the stage with any portion of his/her body.

B. Applicant.

1. To receive a license to operate a sexually oriented business, an applicant must meet the following standards:

a. If the applicant is an individual, the applicant shall be at least eighteen years of age;

b. If the applicant is a corporation, all officers, directors and stockholders required to be named under Section 6.54.040(A)(5)(i) shall be at least eighteen years of age;

c. If the applicant is a partnership, joint venture, or any other type of organization where two or more persons have a financial interest, all persons having a financial interest in the business and who are involved in the day-to-day operation of the business shall be at least eighteen years of age.

2. No individual applicant, no officer, director or stockholder required to be named under Section 6.54.040(A)(5)(i) and no partners required to be named under Section 6.54.040(A)(5)(j) convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a license for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the conviction by the trial court to the date of the application,. The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant until the trial court's conviction is reversed.

3. The applicant shall not have given any false or misleading information on the application, or omitted any material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a license for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a license until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a license until the time period described in subsection (B)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which

contained the misleading statements or omissions, whichever is later.

d. If the misleading statements or omissions referred to violations of Section 17.36.260 of the zoning code, then the applicant shall not be eligible to receive a permit until the time period described in subsection (B)(5) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. An applicant having had a sexually oriented business/establishment license or similar license/permit revoked within the last year shall not be eligible for a license for one year from the date of revocation.

5. No applicant shall have been found to have previously violated Section 17.36.260 of the metropolitan zoning code applicable to sexually oriented/adult entertainment businesses, as evidenced by the judgement of a court within one year immediately preceding the date of the application. If such violations exist, the applicant shall be ineligible for a license for one year from the date the citation was sustained. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant until the trial court's judgement is reversed.

6. Any applicant found to have previously violated this chapter by operating or maintaining a sexually oriented business/establishment within the metropolitan area without a license, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a license for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on

the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 33 – 35 1999; Ord. 99-1503 §§ 31 – 49, 1999; Ord. 97-1022 §§ 40 – 45, 1997; amended during 9-97 supplement; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.060 Permit required.

A. Except as provided in subsection B of this section, from and after March 1, 1999, no person shall be an entertainer in a sexually oriented business within the metropolitan area without first obtaining a permit issued by the board.

B. All current entertainers, as defined in Section 6.54.010, wishing to continue to perform sexually oriented entertainment must submit an application for a permit by March 15, 1999. All current entertainers, who apply for a permit by March 15, 1999, may continue to perform sexually oriented entertainment even if the board votes to deny the application where such denial is appealed to a court in accordance with Section 6.54.070(D)(3). All new entertainers, as defined in Section 6.54.010, may submit an application at any time but may not perform sexually oriented entertainment until a permit is granted except as described in Section 6.54.070(D)(4).

C. Any entertainer found to have previously violated this chapter by providing sexually oriented entertainment in a sexually oriented business, establishment within the metropolitan area without a permit, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a permit for one year from the date of the judgement. The

fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 36, 37, 1999; Ord. 99-1503 § 50, 1999; Ord. 97-1022 §§ 46, 47, 1997; Amdt. 7 (part) and Amdt. 6 § 7 with Ord. 97-796 § 2 (part), 1997)

6.54.070 Application for permit.

A. Application.

1. Any person desiring to secure a permit shall make application to the board. The applicant shall file the original application with three copies. The original application shall be dated by the board and held in the files of the board. A copy of the application shall be distributed the next business day by the board to the Metropolitan Nashville police department and the applicant.

2. Application forms shall be available at the office of the board. Applicants may obtain their application from the codes department. Applicants must also submit with each application two 2 x 2 photos.

a. Background Check. All background checks shall be completed by the metropolitan police department. The police department may be notified of a need for a background check in two ways. The applicant brings his/her application, including one of the two photos to the police department and has his/her fingerprints taken at the police department. The police then begin the background check and once completed, send the background check, application, fingerprint card, and photo to the office of the board. In the alternative, the applicant can obtain fingerprints as described below, turn into the board a complete application including, fingerprints and two photos and the

board shall send the complete application to the police department requesting a background check. The police will return the complete application with the completed background check to the office of the board.

b. Fingerprints. The applicant shall have his/her fingerprints completed by the police department. If the applicant intends to mail his/her application to the board then he/she shall have his/her local law enforcement agency take his/her fingerprints and photograph and that law enforcement agency shall mail the fingerprints directly to the metropolitan police department.

c. Fees. If the applicant brings his/her application to the police department, the police department shall not charge the applicant any additional fee for fingerprinting or a background check. If the applicant has the fingerprinting performed without informing the police department that it is for his/her application for a sexually oriented entertainer permit, then the applicant may retain the receipts for the fingerprinting and give them to the codes department when the applicant files his/her application. The codes department shall subtract the expenses for the fingerprints from the one hundred dollar permit fee, and the applicant shall pay the difference. This same procedure applies if the applicant has his/her fingerprints and photographs taken by their local law enforcement agency and mailed directly to the metropolitan police department. Photos can be taken by the codes department at no additional fee or the applicant may have his/her photo taken elsewhere.

3. The application form shall include all information indicated in subdivisions (4)(a) through (4)(h) of this subsection.

4. The applicant shall furnish the following information under oath:

a. Name and address including all aliases;

b. Proof of the applicant's date of birth demonstrating that the applicant is at least eighteen years of age;

c. All residential addresses of the applicant for the past three years (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

d. The applicant's height, weight, color of eyes, and hair (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature);

e. Whether the applicant previously entertained in this or any other county, city, or state under a sexually oriented business license/permit or similar business license/permit within the last year. For whom the applicant was employed or associated at the time. Whether the applicant has had such a license/permit revoked or suspended within the last year and the reason therefor and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation;

f. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a misdemeanor violation that have occurred within the past two years. All convictions for crimes of a sexual nature, as defined in Section 6.54.010, punishable as a felony that have occurred within the past five years;

g. Fingerprints and two photographs at least two inches by two inches of the applicant (for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature); and

h. A statement by the applicant that he/she is familiar with the provisions of this chapter and a statement swearing that information provided on the application is true and accurate.

B. Investigation. The police department shall investigate the applicant's criminal history by collecting the applicant's fingerprints and 2 x 2 photo and by performing a background investigation for crimes of a sexual nature. The results of the investigation shall be filed in writing with the board no later than twenty days after the date the application was filed with the board. Any investigation information not filed with the board in the time period specified shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if the report revealed no applicable criminal history.

C. Board Action on the Investigation Results.

1. Within fifteen days of receiving the results of the investigation conducted by the police department the board will meet and if it determines that the applicant has not been convicted of a crime of a sexual nature, as defined in Section 6.54.010, has not had a similar type of permit/license revoked in the last year, is at least eighteen years of age, and has not given any false or misleading information on the application or omitted any material facts from the application then the board shall grant the permit.

False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

2. If the board fails to meet within the time period specified, or fails to have a quorum at the meeting then the permit shall be deemed approved and sent to the applicant by United States mail to the address listed on the application.

3. In the event the board denied the application in accordance with Section 6.54.080, such denial and the reason for the denial shall be mailed to the applicant the next business day after the board meeting reviewing the results of the investigation.

4. Any investigation reports not filed with the board in the time period specified in this section shall not prevent the applicant from receiving his/her permit and shall be treated by the board as if that department approved the application.

5. If in the course of the investigation it is discovered any false or misleading statements or information was given on the application, or material facts were omitted from the application, the board shall deny the application in accordance with Section 6.54.080. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

6. The board has the discretion to hold any application for further investigation if: (a) the initial investigation

requires investigation into out-of-state records; or (b) verification of out-of-state employment relating to a sexually oriented business or the revocation of a sexually oriented business license/permit or similar business license/permit is needed. Such additional investigation shall not exceed an additional ten days from the end of the initial fifteen days specified in subsection (D)(1) of this section, unless otherwise agreed to by the applicant.

7. Whenever an application is denied or held for further investigation, the board shall advise the applicant in writing the next business day of the reasons for such action. Upon conclusion of the additional investigation, the board shall advise the applicant in writing the next business day whether the application is granted or denied.

8. Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at a reasonable time and place for examination under oath regarding such application or his or her refusal to submit to or cooperate with any investigation required by this chapter, shall constitute an admission by the applicant that he/she is ineligible for such permit and shall be grounds for denial thereof by the board. This in no way requires the applicant to agree to additional time extensions beyond that allowed in subsection (C)(6) of this section.

D. Denial of the Permit Application.

1. When an application is denied, the applicant has the right to request a hearing within five days of the board's decision.

a. The request shall be in writing and filed with the board within five days of the board's decision.

b. The board shall hear all the evidence pertaining to the denial of the application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

c. At the hearing, the applicant may present evidence as to why his/her application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any denial to the circuit or chancery courts of Davidson County.

d. The board shall affirm or reject the denial of the application at the hearing and in writing state the reasons for the board's decision.

e. The denial of the application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

f. If the board fails to meet within the specified time period, fails to have a quorum, or fails to take action on the application within the specified time period, then the permit shall be deemed approved and sent to the applicant by United States Mail to the address listed on the application within two days of that specified time period.

2. Any denial of the application for a permit may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may also initiate proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall

file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.

3. For any current entertainer, as defined in Section 6.54.010, any adverse administrative decision that is appealed to any court shall not take effect until that decision has been upheld by the court after adjudication on the merits. If the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8). Adverse decisions of the board, which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

4. For a new entertainer, as defined in Section 6.54.010, any adverse administrative decision shall take effect the day the decision is issued by the board. If the adverse administrative decision is appealed to a court, and if the court fails to rule within forty days of the filing of an appeal, a permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the permit then that permit shall be revoked in accordance with Section 6.54.150(C)(8).

E. The permit carried by the entertainer shall contain only the following information:

1. A photo identification as provided by the applicant;

2. A computer-generated number assigned to each applicant, corresponding to the file maintained on each applicant by the sexually oriented business licensing board; and

3. The date the permit was issued. (Ord. 99-1814 §§ 38 – 46, 1999; Amdt. 1 §§ 4 – 7 with Ord. 99-1503 §§ 51 – 64, 1999; Ord. 97-1022 §§ 48 – 62, 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 § 5 (part) and Amdt. 1 with Ord. 97-796 § 2 (part), 1997)

6.54.080 Standards for issuance of a permit.

A. Applicant. To receive a permit as an entertainer, an applicant must meet the following standards:

1. The applicant shall be at least eighteen years of age.

2. No applicant convicted of a crime of a sexual nature, as defined in Section 6.54.010, in any jurisdiction shall be eligible to receive a permit for the time period described below.

a. If the conviction was for a misdemeanor violation, then the applicant shall be ineligible to receive a permit for two years from the date of the conviction.

b. If the conviction was for a felony violation, then the applicant shall be ineligible to receive a permit for five years from the date of the conviction.

c. The time is computed from the date of the application to the date of the conviction.

3. The applicant shall not have given any false or misleading information on the application, or omitted any

material facts from the application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

a. If the applicant gave any false or misleading information or omitted any material facts, then the applicant shall be ineligible to receive a permit for one year from the date of the application which contained the misleading statements or omissions unless the omission or misleading statement referred to the age of the applicant or to a crime of a sexual nature, as defined in Section 6.54.010. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application.

b. If the misleading statements or omissions referred to the age of the applicant, then the applicant shall not be eligible to receive a permit until he/she is eighteen or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

c. If the misleading statements or omissions referred to a crime of a sexual nature, as defined in Section 6.54.010, then the applicant shall not be eligible to receive a permit until the time period described in subsection (A)(2)(a) through (c) of this section has expired or until one year has passed from the date of the application which contained the misleading statements or omissions, whichever is later.

4. The applicant shall not have had a sexually oriented business permit/license or similar business

permit revoked within the last year immediately preceding the application.

5. Any applicant found to have previously violated this chapter of the metropolitan code by providing sexually oriented entertainment within the metropolitan area without a permit, as evidenced by a judgement of a court, within one year immediately preceding the date of the application shall be ineligible for a permit for one year from the date of the judgement. The fact that a trial court's judgement is being appealed shall have no effect on the disqualification of the applicant unless the judgement is stayed. (Ord. 99-1814 §§ 47, 1999; Amdt. 1 § 8 with Ord. 99-1503 §§ 65 – 70, 1999; Ord. 97-1022 § 63 (part), 1997)

6.54.090 Fees.

A. A license fee of three hundred fifty dollars shall be submitted with the application for a license. If the application is denied, one-half of the fee shall be returned.

B. A permit fee of fifty dollars shall be submitted with the application for a permit. If the application is denied, one-half of the fee shall be returned. (Ord. BL99-61 § 6, 2000; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.100 Display of license or permit.

A. The license shall be displayed in a conspicuous public place in the sexually oriented business.

B. The permit shall be carried by or be accessible to the entertainer during that entertainer's working hours

and shall be displayed upon request of any member of the police department, health inspector, or board inspector.

C. If the business for which a license was issued ceases to exist in that a majority of the business assets have been liquidated, or the business has closed and ceased operations, then the license shall be returned to the board and cease to be valid. (Ord. 99-1503 §§ 67(2), 71, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.110 Renewal of license or permit.

A. Every license/permit issued pursuant to this chapter will terminate at the expiration of one year from the date of issuance unless sooner revoked and must be renewed before operation the following year.

B. Any operator desiring to renew a license or any entertainer desiring to renew a permit shall make application to the board. The application for renewal must be filed not later than sixty days before the license/permit expires. The original application for renewal plus the number of copies listed in Section 6.54.040A or 6.54.070A shall be filed and dated by the board.

C. The board shall send a copy to the same departments who would receive a copy of the initial application. These departments shall process the application in the same manner and within the same time limits which apply to the initial application.

D. The board shall provide the applicant with a copy of the application from the previous year and a new application form.

E. The renewal form shall be the same form described in Section 6.54.040A for a license and Section 6.54.070A for a permit except as indicated below in subsection H of this section.

F. For a renewal, the applicant may fill out the new form in its entirety or fill in any information which has changed over the year and is now different than the information indicated on the application from the prior year. The renewal must also include an updated background check by the police department and an updated 2 x 2 photo. The renewal does not require resubmission of fingerprints submitted with the initial application. However, if new or additional persons are involved in the day to day operation of the licensed business those persons must submit fingerprints as described above.

G. If the applicant chooses to only include information concerning items which have changed, he/she will swear to the accuracy of both the information contained in the renewal form and the information attached from the prior year.

H. The renewal application form shall be the same form described in Section 6.54.040A for a license or Section 6.54.070A for a permit except the final line shall state:

> I swear the information I have given in the application from 199___ is still accurate and any facts or circumstances which have changed are indicated in this application for a renewal of the license/permit.
>
> _____
> signature of applicant

I. A license renewal fee of five hundred dollars shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars shall be assessed against the applicant who files for a renewal less than sixty days before the license expires. If the renewal is denied, one-half of the fee collected shall be returned.

J. A permit renewal fee of one hundred dollars shall be submitted with the application for renewal. In addition to such renewal fee, a late penalty of fifty dollars shall be assessed against the applicant who files for renewal less than sixty days before the permit expires. If the renewal is denied, one-half of the fee shall be returned.

K. The application for a renewal is subject to the same rules and limitations as the initial application.

L. When an application for a renewal is denied, the applicant has the right to request a hearing within five days of the board's decision.

1. The request shall be in writing and filed with the board within five days of the board's decision.

2. The board shall hear all the evidence pertaining to the denial of the renewal application at the next regular meeting. The next meeting shall be held no later than fifteen days after the request described above is mailed.

3. At the hearing, the applicant may present evidence as to why his/her renewal application should not be denied. If the applicant fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board. Failing to appear before the board will not preclude the applicant's right to appeal any

denial to the circuit or chancery courts of Davidson County.

4. The board shall affirm or reject the denial of the renewal application at the hearing and in writing state the reasons for the board's decision.

5. The denial of the renewal application shall be mailed by U.S. mail the next business day to the address of the applicant as listed on the application.

6. Any adverse administrative decision regarding the renewal of a license/permit that is appealed to any court shall not take effect until that administrative decision has been upheld by the court after adjudication on the merits. If a court fails to rule within forty days of the filing of an appeal, a new license/permit shall issue. When the court makes a determination after adjudication on the merits that upholds the administrative denial of the renewal for a license/permit then that license/permit shall be revoked in accordance with Section 6.54.150(A)(8) and (C)(8). Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

M. The denial of any renewal for a license/permit may be appealed to the circuit or chancery courts of Davidson County by the applicant. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the applicant or the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan governments shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with the petition for a writ of certiorari. (Amdt. 1 § 9 with Ord. 99-1503

§§ 72, 73, 1999; Ord. 97-1022 §§ 63 (part), 64 – 68, 1997; amended during 9-97 supplement; Amdt. 7 (part) and Amdt. 6 § 5 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.120 Hours of operation.

A. All sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays.

B. All public areas of every sexually oriented business shall be open to inspection at any time during normal business hours by the following departments: police, codes, board inspector, and health. (Ord. 99-1503 § 74, 1999; Ord. 97-1022 § 63 (part), 1997; Amdt. 7 (part) and Amdt. 6 § 8 with Ord. 97-796 § 2 (part), 1997)

6.54.130 Responsibilities of the operator.

A. An operator is responsible for the conduct of all entertainers while on the licensed premises and any act or omission of any entertainer constituting a violation of the provisions of this chapter shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended, renewed or a penalty assessed subject to the limits described in Section 6.54.150(E).

B. No employee on the premises for furthering the business, but not including independent contractors on the premises for repairs and construction, of a sexually oriented business shall allow any minor to loiter around or to frequent a sexually oriented business or to allow any

minor to view sexually oriented entertainment as defined herein on the premises of a licensed business.

C. Every sexually oriented business shall be physically arranged in such a manner that the entire interior portion of any booths, wherein sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos are viewed, shall be visible from the common area of the premises having at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying same. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. Further, any wall forming any portion of the booths, shall be solid and without any openings, extended from the floor to a height of not less than six feet. This section shall be construed in conjunction with Section 6.54.050A.

D. It is unlawful to install enclosed booths for the purpose of viewing of sexually oriented motion pictures, sexually oriented movies, sexually oriented films, sexually oriented videos. The licensee shall be responsible for and shall provide that any booth, or area used for the purpose of viewing sexually oriented motion pictures, sexually oriented movies, sexually oriented films or sexually oriented videos shall be readily accessible at all times and shall be continuously open to view in its entirety.

E. Live sexually oriented entertainment shall not be permitted in booths.

F. A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> This Sexually Oriented Business is regulated by The Metropolitan Code of Nashville and Davidson County, Chapter 6.54 which provides that no customer shall be permitted to have any physical contact with any entertainer on the premises during any performance. All performances shall only occur upon a stage at least eighteen inches above the immediate floor level at least three feet from the nearest customer.

G. It shall be the duty of the operator, to ensure that the line of sight and view area between the common area and any booths remain unobstructed by any doors, walls, merchandise, display racks or other materials at any time that any patron is permitted access to any booth. Entertainers and employees, on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall not place any obstructions in front of any booths at any time that any patron is permitted access to any booth.

H. It shall be the duty of the operator and employees on the premises for furthering the business, not including independent contractors on the premises for repairs or construction to ensure that the illumination in booths, described in Section 6.54.050(A)(1)(b)(v) is maintained at all times that any patron is present on the premises.

I. No operator shall allow openings of any kind to exist between booths, and no person, including entertainers and employees shall make or attempt to make an opening of any kind between any booths.

J. The operator or his/her designee shall, during each business day, regularly inspect the walls between the booths, to determine if any openings or holes exist. If such openings exist it is the duty of the operator to repair the damage as soon as possible. No patron shall be permitted access to a booth, where an opening or a hole exists. It shall be the duty of the operator to ensure those booths are unoccupied by patrons until the opening is repaired or covered. (Ord. 99-1814 § 48, 1999; Amdt. 1 § 10 with Ord. 99-1503 §§ 75 – 84, 1999; Ord. 97-1022 §§ 63 (part), 69 – 73, 1997; Amdt. 7 (part) with Ord. 97-796 § 2 (part), 1997)

6.54.140 Prohibitions and unlawful sexual acts.

A. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, of a sexually oriented business shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia on the premises.

B. No operator, entertainer or employee on the premises for furthering the business, not including independent contractors on the premises for repairs or construction, shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any entertainer, operator or employee.

C. No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only

occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

D. Only one individual shall occupy a booth at any time. No occupant of a booth shall engage in any type of copulation, masturbation or the display of specified anatomical areas as defined herein or cause any bodily discharge of urine, feces or semen while in the booth. No individual shall damage or deface any portion of the booth.

E. Live sexually oriented entertainment shall not be permitted in booths.

F. No customer shall invade the three-foot boundary from the outer edge of the stage as required to be designated by Section 6.54.050(A)(3). (Ord. 99-1814 §§ 49, 50, 1999; Ord. 99-1503 §§ 85 – 87, 1999; Ord. 97-1022 § 63 (part), 1997; amended during 9-97 supplement; Amdt. 7 (part), Amdt. 6 §§ 3, 4 and Amdt. 4 with Ord. 97-796 § 2 (part), 1997)

6.54.150 Revocation or suspension of license/permit.

A. The board shall revoke a license for any of the following reasons:

1. Discovery that false or misleading information or data was given on an application, or material facts were omitted from an application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The licensee was or has become ineligible to obtain a license under Section 6.54.050(B);

3. Any cost or fee required to be paid by this chapter is not paid;

4. The licensee knowingly employs, or with due diligence should have known that licensee was employing, an entertainer who does not have a permit. The licensee knowingly provides, or with the exercise of due diligence should have known the he/she was providing, space on the premises whether by lease or otherwise to an independent contractor who performs or works as an entertainer without a permit;

5. The licensee sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises. The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, the licensee's employee, who is on the premises furthering the business of the licensee, from selling, furnishing, giving, displaying, or causing to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, an entertainer to sell, furnish, give, display, or cause to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the licensed premises;

6. The licensee knowingly denies, or thorough the exercise of due diligence should have known that he/she was denying, access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to

any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent, his/her employee, who is on the premises furthering the business of the licensee, to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold.

The licensee knowingly allows, or thorough the exercise of due diligence should have been able to prevent an entertainer to deny access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The attempted transfer of a license or any interest in a license;

8. If an application for a license or a renewal of a license was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits then that license shall be revoked on the effective date of the court's judgement.

9. The licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54.

A continuing violation shall mean more than two judgements from the board, unless the decision of the board is appealed and overturned, that the licensee

violated Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation has been continuing until such time as the judgment of the board is reversed.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54 that the licensee did not know, or through the exercise of due diligence could not have known that his/her employees' acts or an entertainer's acts would violate Chapter 6.54. If the licensee knew or should have known that his/her employees' acts or an entertainer's acts were violating any subsection of Chapter 6.54, the licensee may still affirmatively prove as a defense to the violation that the licensee was powerless to prevent the continuing unsafe or unsanitary condition.

10. Continuous Violations of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. Continuous violations shall mean that the licensee had more than two judgements entered against him/her for violating Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four month period, not including periods of suspension. The fact that the trial court's judgement is being appealed shall have no effect on the revocation until such time as the judgement of the trial court is reversed.

B. The board shall either fine, suspend or fine and suspend a license for any of the following reasons, that are not sufficient grounds for revocation:

1. The licensee fails to maintain the licensed premises in a sanitary or safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

The licensee may affirmatively prove as a defense to an alleged violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 that he/she did not know, or through the exercise of due diligence could not have known of his/her employee's acts or omissions or an entertainer's act or omissions. If the licensee knew or should have known that his/her employee or an entertainer was violating any such subsection of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030, the licensee may still affirmatively prove as a defense to the alleged violation that he/she was powerless to prevent the unsafe or unsanitary condition.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the licensee shall either be fined five hundred dollars or his/her license shall be suspended for a period no less than five days and no longer than thirty days or the licensee shall be both fined five hundred dollars and his or her license suspended for a period of not less than five days and no longer than thirty days.

3. Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the license shall be suspended no less than thirty-one days and no longer than ninety days.

A second violation of Chapter 6.54, shall mean a prior judgement from the board, unless the decision of the board is appealed and overturned, that the licensee violated

Chapter 6.54 within a twenty-four-month period, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the violation occurred previously until such time as the judgment of the board is reversed.

A second violation of Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 shall mean a judgment from a trial court that the license violated Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030. The fact that a trial court's judgment is being appealed shall have no affect on the suspension and the judgment shall be treated as a violation until such time as the judgment of the trial court is reversed.

C. The board shall revoke a permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application, or material facts were omitted from any application. False or misleading information does not include information which the applicant reasonably believed, after exercising due diligence, was correct at the time of the application;

2. The permittee has become ineligible to obtain a permit under Section 6.54.080A;

3. Any cost or fee required to be paid by this chapter is not paid;

4. The permittee provides sexually oriented entertainment on the premises of an operator who he/she knows, or with the exercise of due diligence should have known, does not have a license;

5. The permittee knowingly, or with the exercise of due diligence should have known that he/she, sells, furnishes, gives, displays, or causes to be sold, furnished, given or displayed to any minor any sexually oriented entertainment or sexually oriented material on the premises;

6. The permittee knowingly denies, or through the exercise of due diligence should have known that he/she was denying access to law enforcement personnel during business hours to any portion of the licensed premises wherein sexually oriented entertainment is permitted or to any portion of the licensed premises wherein sexually oriented material is displayed or sold;

7. The permittee attempted to transfer his/her permit or any interest in his/her permit to someone else;

8. The application for a permit or the application for the renewal of a permit was denied and that administrative denial was appealed and upheld by a court after adjudication on the merits;

9. The permittee repeatedly fails to comply with the provisions of Chapter 6.54. Repeatedly fails to comply shall mean that the permittee has been found by the board to have violated Chapter 6.54 more than twice within a period of twenty-four months, not including any period of suspension. The fact that the board's judgment is being appealed shall have no affect on the determination that the permittee has repeatedly failed to comply until such time as the judgment of the board is reversed.

D. The board shall suspend a permit for any of the following reasons that are not grounds for revocation:

1. The permittee violates Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030.

2. Upon the first violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permittee shall either be fined five hundred dollars or his or her permit shall be suspended for a period no less than five days and no longer than thirty days or the permittee shall be both fined five hundred dollars and his or her permit suspended for a period of no less than five days and no longer than thirty days.

Upon the second violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030 within a twenty-four-month period, not including periods of suspensions, the permit shall be suspended no less than thirty-one days and no longer than ninety days.

E. The board shall follow the following procedure for revoking or suspending a license or a permit.

1. Before revoking or suspending any license or permit the board shall give the operator or entertainer five days' written notice of the alleged violation(s) against him/her. In such cases the charges shall be specific and in writing except under Section 6.54.150(A)(7), (8) and Section 6.54.150(C)(7), (8) of this chapter.

2. The board shall hear all the evidence pertaining to the revocation or suspension at the next regular meeting.

The next meeting shall be held no later than fifteen days after the notice described above is mailed. The licensee/permittee may present evidence bearing upon the question of suspension/revocation.

3. If the licensee/permittee fails to appear at the hearing before the board he/she will have waived the right to present evidence to the board on the citation. Failing to appear before the board will not preclude the licensee's/permittee's right to appeal any revocation/suspension to the chancery court of Davidson County.

4. If the licensee/permittee requests a hearing, the license/permit shall remain in effect and valid during the appeal to the board until such time as the hearing is held.

5. Any adverse administrative decision to suspend or revoke a license/permit that is appealed to the circuit or chancery courts of Davidson County shall not take effect until the administrative decision has been upheld by the court after adjudication on the merits. Adverse decisions of the board which are not appealed shall not take effect for sixty days from the date of the decision to allow the affected party time to seek judicial review.

6. The revocation/suspension of a license/permit may be appealed to the circuit or chancery courts of Davidson County by the licensee/permittee. The metropolitan department of law may initiate proceedings for a declaratory judgment in the circuit or chancery court for Davidson County. If the permittee/licensee chooses to appeal by filing a petition for a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within seven days from the grant of the writ of certiorari.

F. Any operator or entertainer whose license or permit is revoked shall not be eligible to receive a license or permit for one year from the date of revocation. (Amdt. 1 §§ 11-13 with Ord. 99-1503 § 88, 1999)

6.54.160 Penalties and prosecutions.

A. Any individual, partnership or corporation violating any of the provisions of this chapter shall be subject to any of the following penalties:

1. Five hundred dollars for each offense; and/or

2. A suspension of any license/permit for a specified period of time for each offense listed in Section 6.54.150B or D; or

3. Revocation of any license/permit for any conduct listed in Section 6.54.150A or C.

B. The penalty of suspension may not be combined with revocation. A fine alone can be a penalty or it may be combined with a suspension.

C. Each violation of this chapter shall be considered a separate offense and any continuing violation shall be considered a separate offense for each day of the violation. (Ord. 99-1503 §§ 89, 90, 1999; Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

6.54.170 Invalidity of part.

Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan

government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter. (Ord. 97-1022 § 63 (part), 1997; Ord. 97-796 § 2 (part), 1997)

CERTIFICATION

I, Marilyn S. Swing, being the duly appointed Metropolitan Clerk of The Metropolitan Government of Nashville and Davidson County, do hereby certify that the foregoing is a true and exact copy of **CHAPTER 6.54** of the Metropolitan Code of Laws as adopted by Ordinance No. BL2004-420.

WITNESS MY HAND and the Seal of the Metropolitan Government of Nashville and Davidson County, Tennessee, this 10th day of December, 2004.

/s/ Marilyn S. Swing
Metropolitan Clerk

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me, by Marilyn S. Swing this 10th day of December, 2004

/s/ Vicki L. Lang
Notary Public

My Commission expires: 03/26/05

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	Case No. 3-97-1066 Judge Nixon Magistrate Griffin
	Consolidated Cases
JERRY C. PENDERGRASS, ET AL. Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE Defendant.	No. 3-97-1176 Judge Nixon Magistrate Judge Griffin

MOTION TO DISSOLVE PRELIMINARY INJUNCTION AND REQUEST FOR HEARING

(Filed Jul. 21, 1998)

Come the defendants, through counsel, and respectfully move this Honorable Court to dissolve the preliminary

injunction previously entered herein, and as grounds therefore state as follows:

On December 8, 1997 the Court entered its Memorandum and Order granting plaintiffs a preliminary injunction against the enforcement of Chapter 6.54 of the Metropolitan Code, commonly known as the Metropolitan Government's Sexually Oriented Business ordinance. (Docket nos. 22 and 23). Since that date, however, two significant events have occurred: an amended version of Chapter 6.54 has now been enacted by the Metropolitan Council, and the Tennessee Legislature passed amendments to T.C.A. § 27-9-111 which have been signed into law by Governor Sundquist. Both of these developments serve to significantly change the operation and effect of Chapter 6.54 from the version that existed when the Court issued its preliminary injunction. Defendants respectfully submit that these two new developments serve to eliminate the provisions of the prior version of Chapter 6.54 which the Court found violated plaintiffs rights to prompt judicial review. Since the defects in the operation and effect of the ordinance have now been cured, defendants submit there are no longer grounds to justify continuing the preliminary injunction, and the injunction should be dissolved.

As an additional ground in support of this motion, defendants invite the Court to consider the fact that plaintiffs have not complied with Fed. R. Civ. P. 65(c) regarding the giving of security before an injunction shall issue.

Defendants respectfully invite the Court to consider the attached memorandum of law, and the following exhibits submitted in support of the instant motion:

1. A copy of amended Chapter 6.54 (Exhibit A); and

2. A certified copy of the amendments to T.C.A. § 27-9-111 (Exhibit B).

Defendants respectfully request a hearing on this motion at the earliest time the Court's docket will allow.

WHEREFORE, defendants ask that this Court grant the instant motion to dissolve the preliminary injunction.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY
JAMES L. MURPHY III, # 9589
DIRECTOR OF LAW

/s/ James L. Charles
James L. Charles # 9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young # 16554
Metropolitan Attorney

/s/ Shayna Abrams
Shayna Abrams # 16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been mailed to John Herbison, 2016 Eighth Avenue South, Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103 and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 21st day of July 1998

/s/ Shayna Abrams
Shayna Abrams

AGENDA

April 27, 1999

9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD

700 SECOND AVENUE SOUTH

HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

[2] APPEARANCES

Mr. James Avril
Mr. Alan Banks, Sr.
Dr. Donald Boatright, Chair
Ms. Mary Martin Schaffner, Vice Chair
Reverend Becca Stevens
Ms. Leslie Shectner
Ms. Linda Borum

* * *

[10] Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.

[11] MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's [12] finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

[13] MR. CHAIRMAN: This application is denied.

* * *

[15] The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of those items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide hand towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or [16] approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for the ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

* * *

[26] MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MR. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

[27] MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

[35] The next application is 21 Up Video, 3920 Lebanon Pike

Ms. Borum.

MS. BORUM: We recommend disapproval. It does not comply with zoning. It does not comply with health. Some of those items were: Provide covered trash cans, hot running water and hand towels in the rest rooms.

MS. SCHAFFNER: Am I understanding when you say it doesn't comply with zoning is that it is not within the adult entertainment –

MS. BORUM: It's not within the adult entertainment overlay.

[36] MS. SCHAFFNER: – overlay or is not grandfathered in; is that correct?

MS. BORUM: Correct.

MS. SCHAFFNER: And the health report found that all garbage storage containers didn't have tight fitting lids or covers. There was not hot running water at the hand sink in the rest room. And there weren't individual hand towels in the rest room: is that right?

MS. BORUM: Yes, ma'am, correct.

MS. SCHAFFNER: I move that the application of 21 Up Video at 3920 Lebanon Pike be denied on the basis of not in conformance of the zoning requirements and in addition is in violation of the health code.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on zoning report and the health report. Is there any discussion? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Okay. The motion carries. This application has been denied.

* * *

[38] Purple Onion I, 2807 Nolensville Pike.

MS. BORUM: We recommend disapproval. Even though they are not in the adult entertainment overlay, they are legally nonconforming, so they do comply with

zoning. They do not comply, though, with the booth requirement, no open sides. Walls not solid. Does not comply with health codes. Some of those items: Clean floors and walls; provide covered trash cans and hot running water.

MS. SCHAFFNER: Where is the – the report from? Who reports on the booths? Codes?

MR. CHAIRMAN: Codes.

MS. BORUM: Yes, ma'am, the building inspector. And that's on the third page, item three and six.

MS. SCHAFFNER: Number three: "Is access unobstructed by any door, gate, lock or any other control-type devices?" He checked no. Also checked no to all walls being solid without any openings, et cetera. In the summary report says it does not comply with the codes; is that correct?

MS. BORUM: Yes, ma'am, that's correct.

MS. SCHAFFNER: And as far as the health report, it says they need to clean the floors and walls in the rest room; provide covered trash containers and tight [39] fitting lids in the bathroom and common area; provide hot running water in the rest room, right?

MS. BORUM: That is correct.

MS. SCHAFFNER: So as far as this checklist goes, in fact, it should be health, no, right?

MS. BORUM: Correct.

MS. SCHAFFNER: And . . .

MS. BORUM: And the building disapproved.

MS. SCHAFFNER: Building disapproved.

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: But the zoning is grandfathered in, correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: I move this application be denied on the basis of the failure to comply with health codes and building codes as contained in the codes inspector's report.

MR. CHAIRMAN: Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied. Is there any discussion? All in favor signify by aye.

(All board members voted aye.)

MS. STEVENS: I have a question for legal before we go on.

[40] MR. CHAIRMAN: This application is denied. Okay.

* * *

[45] The next application is Metro News, 822 5th Avenue South.

* * *

[47] MR. CHAIRMAN: Is there any discussions?

MS. STEVENS: I have a question on the health report. What happened to all that stuff that was [48] listed?

MR. BANK: Because they have approved it on the checklist.

MS. STEVENS: Just on the second page, third page.

MS. BORUM: Okay.

MR. BANKS: It said –

MS. BORUM: Yes, I'm sorry. That is disapproved, also for health. I'm sorry, I apologize.

MS. SCHAFFNER: I amend my motion.

MR. STEVENS: Thank you.

MS. SCHAFFNER: I withdraw that motion and move that the application be denied on the basis of the health violations, which include: The floors are not thoroughly cleaned throughout the facility and common areas and rest rooms and booths; walls on the upper floor leading to the booths and stairways were not clean; the lighting was insufficient; the lids and covers on the garbage cans were not tight fitting; there wasn't hot running water in the rest room in the basement and hand towels in the rest room in the basement, women's rest room. And, in addition, that it be disapproved on the basis of the applicant had been convicted of – what is the phrase for it?

MS. SHECTNER: Misdemeanor. Crime of a [49] sexual nature was a misdemeanor.

MS. SCHAFFNER: Misdemeanor crime of a sexual nature. For those reasons, I move it to be disapproved.

MR. BANKS: Mr. Chairman, could I ask one more question? On the guideline, if you'll turn the diagram. The bottom left it says, "Doors to video booths will be removed upon submission of license application." That may or may not have been done. I do know that on this diagram all the booths had doors on them.

MS. BORUM: The inspector's report is the fifth page.

MR. BANKS: I just needed something that says – okay. We didn't know we had that.

MS. BORUM: The summary report, "The business located complies."

MR. BANKS: Okay. So that we would refer to the building report, right?

MS. BORUM: That is right.

MR. CHAIRMAN: The motion you have before the board is that this application be denied based upon the background report of a misdemeanor sexual offense as well as the health inspector's report.

MS. STEVENS: Second.

MR. CHAIRMAN: Okay. All in favor – it [50] has been moved and seconded that we – all in favor signify by saying "aye."

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This motion carries. This application is denied.

* * *

SEXUALLY ORIENTED BUSINESS LICENSING BOARD
NOTICE OF DECISION ON APPLICATION
APRIL 28, 1999

TO: **Mr. Michael Rucker**
C/o Deja Vu of Nashville
1214 Demonbreun Street
Nashville, Tennessee 37203

FROM: **The Sexually Oriented Business Licensing Board**

SUBJECT: **Decision of the Board on Your Application for a License**

DATE: **April 28, 1999**

The Sexually Oriented Business Licensing Board ("Board") met to consider your application for a license to operate a sexually oriented business on Tuesday, April 27, 1999. The Board denied your application for the following reasons:

1. Failure to comply with required health standards set out below:

   a. Unclean couches, restroom walls and fixtures, and shower stalls.

   b. Repair commode, provide covered waste containers.

   This failure to comply is in violation of Metropolitan Code of Laws § 6.54.040(C)(9).

2. Violation of 3-foot distance requirement.

   This failure to comply is in violation of Metropolitan Code of Laws § 6.54.140(C).

3. The Board also adopted a definition of the term "booth" which includes "any compartment, room, cubicle, stall or any other enclosure separate from the

> common areas of the premises. Your establishment will be re-inspected by the Board's Inspector to determine if it does in fact have booths. If booths are present, then they must conform with the requirements of Metropolitan Code of Laws § 6.54.050(A). Live performances must conform with Metropolitan Code of Laws § 6.54.140(C).

Your statement in your application that you are not providing a diagram based upon Ms. Abrams' representation at the March 26, 1999, federal court hearing, where she stated that "the booth regulations and diagram requirements did not apply any longer to cabarets and nightclubs" will not suffice. Your statement indicates that you may have misunderstood what Ms. Abrams was attempting to convey to the court. Booth requirements are unique to booths. Metropolitan Code of Laws § 6.54.050(A). They do not apply throughout the dance establishment, but only to the booths themselves. The fact that an entertainer may be providing a live performance inside a booth, and violating § 6.54.140(C), does not transform the booth into a "cabaret" or "nightclub" such that the booth requirements do not apply. What Ms. Abrams actually said in the hearing was in response to your counsel's statement that, "My client's club has carpeting, it's dark carpet. The ordinance requires a light floor." The court asked, "What's the rationale for a light piece of carpet rather than a dark piece of carpet?" Ms. Abrams responded, "Your Honor, actually just to correct, I believe counsel for the plaintiff misspoke. As to dance establishments, that is not the requirement. That is the requirement for the booths, places where you view movies need to have light-colored non-absorbent walls and floors." As Mr. Shaffer himself later acknowledged in the hearing, "What the ordinance would prohibit is dancing inside the booth because you can only have one

person in the booth. You cannot have a customer and a dancer." You must submit a diagram indicating how your booths are currently located in accordance with Metropolitan Code of Laws § 6.54.040(A)(6), if sexually oriented entertainment is provided in the booths.

Because your application has been disapproved, you may elect to do the following:

1. *Within five (5) days of the disapproval* **(May 3, 1999)**, you may request, in writing, an evidentiary hearing before the Board. If you request an evidentiary hearing, it will be held **May 11, 1999**.

2. *Within fifteen (15) days of the disapproval* **(May 12, 1999)**, you may make a written request to be allowed more than fifteen (15) days in which to cure the violation(s). An applicant will only be granted an extension to cure the violation(s) if the codes inspector and the health inspector agree that an extension will not endanger the health or safety of the community and the Board determines that the applicant has demonstrated a good faith effort to cure the violation(s) in a timely manner. The request for an extension would be heard at the Board's next regular meeting, either **May 11, 1999** or **June 1, 1999**, depending on when the Board has received your request for an extension.

3. *Within fifteen (15) days of the disapproval* **(May 12, 1999)**, you may request reinstatement of the application by notifying the Board that you have cured all violations and by requesting that the business be re-inspected. Re-inspection reports will be filed with the Board and considered at the next regular meeting following the filing of the re-inspection report(s), either **May 11, 1999** or **June 1,**

1999, depending on when you notify the Board that you have cured all the violations.

4. You may immediately appeal the Board's denial to the circuit or chancery court.

If you believe that your application was wrongfully denied or that you intend to come into compliance with the requirements for a license, you are encouraged to make a written request for an evidentiary hearing before the Board by **May 3, 1999** (Option No. 1). You must make this request in order to preserve your right to the evidentiary hearing. If you do not make such a request within five (5) days of the disapproval, you will have forfeited your right to an evidentiary hearing before the Board.

AGENDA

May 11, 1999

7:30 a.m.

METROPOLITAN ADULT
ENTERTAINMENT BOARD

700 SECOND AVENUE SOUTH

HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

[2] APPEARANCES

Mr. Alan Banks, Sr.
Dr. Donald Boatright, Chair
Ms. Mary Martin Schaffner, Vice Chair
Reverend Becca Stevens
Ms. Shana Abrams
Ms. Linda Borum

* * *

[18] MS. SCHAFFNER: If the board were to give you some time to look into that, would you be willing to waive your time limits in writing?

KEN MERONEY: I need to ask counsel about that.

[19] UNKNOWN ATTORNEY: No!

MR. CHAIRMAN: Basically, we have the report from the codes inspector and the board's inspector.

Is there a motion from the board to approve the application? Is there a motion from the board to deny the application?

MS. SCHAFFNER: I move it be approved.

MR. CHAIRMAN: It has been moved. Is there a second that this application be approved? Is there a second?

MS. SCHAFFNER: It fails for want of the second; motion fails.

MR. CHAIRMAN: Motion fails for one of the second.

MS. STEVENS: Chairman, could I entertain a motion for it to be denied?

MS. BORUM: Could y'all all speak a little bit louder?

MR. CHAIRMAN: Your motion is what?

MS. STEVENS: I move, based on the codes report, based on the same reason that the motion was not ratified, it is still a booth and was not changed, and I move that the permit be denied.

MR. CHAIRMAN: We move that the permit be [20] denied on the basis of the codes inspector's report.

MS. STEVENS: And on the basis of the wall not being removed on the second floor.

MR. CHAIRMAN: There's a motion on the floor that the application be denied, the re-inspection application be denied. Is there a second?

MR. BANKS: I second that.

MR. CHAIRMAN: Is there any further discussion? All in favor that this application be denied signify by saying aye.

MR. BANKS: Aye.

MS. STEVENS: Aye.

MS. SCHAFFNER: Oppose

MR. CHAIRMAN: Two ayes, one oppose. Two to one opposed. So the motion is denied. Motion passes that this application be denied. The motion passes that this application be denied. The motion passes that this application be denied by a vote of two to one.

Let's move on to the next application.

* * *

METROPOLITAN ADULT ENTERTAINMENT BOARD
HEARING
700 Second Avenue South
Howard Office Building
Nashville, Tennessee 37201

Hearing: May 25 1999
Time: 9:00 a.m.

ELITE REPORTING SERVICES
MAX CURRY, B.C.R., CCR, CRI
Bachelor's Degree of Court Reporting
806 Porter Road
Nashville, Tennessee 37206

(615) 262-9592

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[2] APPEARANCES

BOARD MEMBERS PRESENT

MR. DONALD BOATRIGHT, Chair

MS. MARY MARTIN SCHAFFNER, Vice-Chair

MR. ALAN BANKS, SR.

REV. BECCA STEVENS

APPEARING FOR METRO

MS. SHAYNA ABRAMS

MR. JAMES CHARLES

* * *

[47] DR. BOATRIGHT: Okay. It's been moved and seconded that we issue Ken's Gold Club an ordinance.

MR. CHARLES: A license.

DR. BOATRIGHT: A license. All in favor signify by saying 'aye'.

MR. BANKS: Aye

MS. SCHAFFNER: Aye

[48] DR. BOATRIGHT: All – nay?

MS. STEVENS: Nay.

DR. BOATRIGHT: It's two to one. The motion carries.

* * *

[80] DR. BOATRIGHT: Thank you for your arguments. The Board will entertain a motion for approval.

MS. SCHAFFNER: I move that it be approved. In support of that I would like to say that I think – I continue to believe there is ambiguity about what booths are in the ordinance, which I fervently hope will be addressed.

While there is ambiguity, I think that we are obligated to rule in favor of the applicants and their rights and let the ambiguity be clarified by Metro, if it is the intent of the Metro Council to prohibit. At this point I don't think that this is sufficiently clear, and for that reason I move that it be approved.

[81] DR. BOATRIGHT: Is there a second?

(No response heard.)

DR. BOATRIGHT: Any discussion?

(No response heard.)

DR. BOATRIGHT: Okay. The motion failed for second and Deja Vu's license is denied on appeal.

MR. RUCKER: Thank you for your time.

THE CLERK: I need a motion to deny it.

DR. BOATRIGHT: Okay. Is there a motion to deny the application?

MR. BANKS: I make the motion to deny the application.

DR. BOATRIGHT: Is there a second?

MS. STEVENS: Yes.

DR. BOATRIGHT: All in favor of denying?

MS. SCHAFFNER: Can I ask your reason?

MR. BANKS: I believe under the definition in the ordinance, it would be remiss of me to look at this and say this is not a booth. I believe it is a booth, and I believe there can only be one person in a booth.

MS. SCHAFFNER: But what is the definition of booth you are using to base your judgment on?

MS. STEVENS: Well, what I was using partly was – when everyone was talking, you described these club areas; and, secondly, it seems like if they are saying, [82] yes, we comply because we don't have this wall here, then it makes sense that you're talking about a booth. That's

what everybody has been talking about the whole time we've been talking about it.

It seems like to me, as a Board member who is not from the legal profession, the best I can do is go by what my understanding of it is and go by the representations of the legal counsel we have been given.

MR. BANKS: Are these rooms, are these cubicles, are these closets, or are they booths?

MS. SCHAFFNER: I was just asking what definition you are using to call these booths?

MR. BANKS: These are separated from the general area. When – the other gentleman said, 'You know, this is really open and it's really just a part of the overall room; that you go in and' – I would assume if you do a table dance, you're going to pay for a private table dance. And I couldn't just walk up – walk in there and sit right next to somebody who paid for a private table dance. No, this is separated – a separated area from the general part of the – of the entertainment establishment; and, therefore, to me it's either a room or a booth, and I don't consider these rooms.

MS. SCHAFFNER: Okay.

MR. BANKS: And only one person can be in a [83] booth.

MS. STEVENS: I totally would love to have some clarification of this ambiguity cleared up, because it's very confusing.

DR. BOATRIGHT: Now, is there a second?

MS. STEVENS: Of what? For a motion to – we did it.

DR. BOATRIGHT: All right. She did it.

All in favor of denying the application signify by saying 'aye'.

MR. BANKS: 'Aye'.

MS. STEVENS: 'Aye'.

DR. BOATRIGHT: All in favor of.

MS. STEVENS: All opposed.

DR. BOATRIGHT: All opposed to the motion signify by saying 'nay'.

MS. SCHAFFNER: Nay.

DR. BOATRIGHT: Nay.

MS. STEVENS: Are you voting nay?

MS. SCHAFFNER: Well, I don't think you can vote acceptable.

MS. STEVENS: Can he vote?

MS. ABRAMS: (Shakes head negatively.)

DR. BOATRIGHT: It's two to one.

MS. STEVENS: The other thing I would like to [84] have on the record is what happened to the other Board member.

MS. SCHAFFNER: We have something else on the agenda.

MS. STEVENS: We do? What?

DR. BOATRIGHT: Another motion, Miko's.

MS. SCHAFFNER: Wait a minute. Okay.

DR. BOATRIGHT: Last thing – last item on the agenda is Miko's located at the 511 8th Avenue North. It was present at the last meeting. There was a request for withdrawing that application. Any change on that?

MR. KIRKLAND: I have not had any further communication from anyone, so I don't have anything further to offer this Board. I have not heard from Ms. Hunter. I have heard from Mr. Lynch. I have no reason to dispute Mr. Lynch's representation that he represents Ms. Hunter.

MS. SCHAFFNER: I would move that we withdraw.

MS. STEVENS: Seconded.

DR. BOATRIGHT: Is there a second?

MS. STEVENS: Yes, sir.

DR. BOATRIGHT: All in favor signify by saying 'aye'.

(WHEREUPON, responses of 'aye' were heard.)

[85] DR. BOATRIGHT: Okay. Motion carries.

* * *

Sexually Oriented Business Licensing Board
700 2nd Avenue South
Nashville, TN 37201
615-862-6556

May 26, 1999

Mr. Mike Rucker
c/o Deja Vu
1214 Demonbreun Street
Nashville, TN 37203

Dear Mr. Rucker:

The Sexually Oriented Business Licensing Board met to consider your license application denial in response to you request for an evidentiary hearing on your previously denied application for a license to operate a sexually oriented business. This evidentiary hearing was held on Tuesday, May 25, 1999.

The Vice Chair made a motion to grant the application which failed for lack of a second. A board member then made a motion to deny the license application which received two votes for denial and two votes against denial.

Section 6.54.020(D)(3) states "The concurring vote of a majority of the members present and voting shall be necessary for the granting, revoking, suspending or any other action involving licenses or permits." Since the tie vote of two to two is not a "concurring vote of the majority". The license was neither approved or denied. Section 6.54.040(E) specifies that the Board must hold the hearing at the next regular meeting at which they shall affirm or reject the denial of the application.

Section 6.54.040(C)(3) states "If the board fails to meet in the time period specified or fails to have a quorum at the meeting, then the license shall be approved and sent to the applicant by United States Mail to the address listed on the application." Since the Board did not act on your application within fifteen days of your request for an evidentiary hearing, the license is granted.

/s/ Mary Martin Shaffner
Mary Shaffner, JD,
Vice Chair

Very truly yours,

/s/ Linda Borum w/permission
Linda J. Borum
Secretary, Sexually Oriented
Business Licensing Board

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)
Plaintiffs,	)
vs.	) Civil No. 3:97-1066
METROPOLITAN GOVERNMENT, et al.,	) Judge Higgins
Defendants.	) Magistrate Judge Griffin
and	(consolidated cases)
JERRY C. PENDERGRASS, et al.,	)
Plaintiffs,	)
vs.	) Civil No. 3:97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	) Judge Higgins
Defendant.	) Magistrate Judge Griffin

AFFIDAVIT OF JOHN E. HERBISON IN SUPPORT OF CO-COUNSEL'S REQUEST FOR INTERIM ATTORNEYS' FEES

State of Tennessee)
County of Davidson)

JOHN E. HERBISON, being duly sworn according to law, makes oath as follows:

1) I am an attorney licensed to practice law by the state of Tennessee since 1987. I am a member in good standing of the bar of this Court, the Supreme Court of Tennessee, the United States Court of Appeals, Sixth Circuit, and the United States Supreme Court.

2) Along with H. Louis Sirkin of the Ohio bar, I represent the Plaintiffs before this Court in the *Pendergrass* matter, that is, Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

3) Since approximately 1988 I have been continuously retained by Mr. Pendergrass individually in regard to representation of adult entertainment businesses with which Mr. Pendergrass is associated. I have been continuously retained by The 822 Corporation since that business was incorporated in 1992. My participation in the instant lawsuit is pursuant to these retainer agreements.

4) My fee arrangements with Mr. Pendergrass and The 822 Corporation for professional services include the regular payment of a monthly, flat fee. I have accordingly not billed my clients by the hour for my time in the instant lawsuit, and, because I have not kept contemporaneous time records, I have elected not to submit a request for an award of interim fees in this matter.

5) The substantive work which I have done on this lawsuit, *e.g.*, legal research, drafting pleadings and motions, appearing in court, participating in discovery, etc., has been performed pursuant to the above-described retainer. As the only Plaintiffs' attorney in this action based in Nashville, however, I have performed services benefitting all of the Plaintiffs in the consolidated cases, for example, filing certain documents, serving documents on opposing counsel, procuring and serving subpoenas,

coordinating scheduling of telephone conferences, etc. To the extent that these services have benefitted parties other than those by whom I am retained, I have not charged these parties for my time. It is my opinion and belief that my attending to these logistical matters has reduced the number of hours which would otherwise have been expended by co-counsel for the *Pendergrass* Plaintiffs and both counsel for the *Deja Vu* Plaintiffs, for which these counsel likely would have billed and sought a greater amount of fees under 42 U.S.C. § 1988 had I not performed such services.

FURTHER THE AFFIANT SAITH NOT.

/s/ John E. Herbison
JOHN E. HERBISON

Sworn to and subscribed before me this 10th day of June, 1999.

/s/ [Illegible]
NOTARY PUBLIC

My Commission expires: 3/24/01

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 3-97-1066
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	Judge Aleta Trauger Magistrate Judge Griffin
Defendants.	)	
		Consolidated Cases
JERRY C. PENDERGRASS, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	Judge Aleta Trauger Magistrate Judge Griffin
Defendants.	)	

AFFIDAVIT OF H. LOUIS SIRKIN IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL MOTION FOR ATTORNEYS' FEES

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

H. Louis Sirkin, being duly sworn, deposes and states as follows:

1. I am an attorney at law admitted to practice in the State of Ohio, the United States District court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States.

2. I graduated from the University of Cincinnati Law School in 1965. I was admitted to practice law in Ohio in 1965.

3. Currently, I am a partner at the law firm of Sirkin, Pinales, Mezibov & Schwartz. My law practice today and for many of the previous years has involved federal court and civil rights litigation. I have litigated numerous cases involving civil rights, the First Amendment, and criminal defense. I have tried cases in state and federal court and argued cases before the Sixth Circuit Court of Appeals. I am a fellow of the American College of Trial Lawyers.

4. I am seeking fees at the rate of Two Hundred Twenty-five and No/100 Dollars ($225.00) per hour in this case based in part on the examination of similar awards to comparable attorneys practicing law in this jurisdiction.

5. The time sheets attached are an accurate representation of the services performed on behalf of the plaintiff, Jerry Pendergrass, et al., in the appeal of this case. The records are kept contemporaneously with the services that have been performed.

6. Billing judgment was exercised at the time the work was originally entered so that not all time for a particular service was recorded.

7. The total number of hours expended by Plaintiffs' attorneys to defend the appeal in this case was reasonable.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ H. Louis Sirkin
H. Louis Sirkin
(Ohio Bar No. 0024573)

Sworn to and subscribed before me, a Notary Public, this 11 day of June, 1999.

/s/ John Feldmeier
Notary Public
My Commission
Expires: ___

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1066 Judge Higgins
	Consolidated Cases
JERRY C. PENDERGRASS, et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1176 Judge Higgins

AFFIDAVIT OF BRADLEY J. SHAFER IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEY FEES

Bradley J. Shafer, being first duly sworn, deposes and states as follows:

1. I am an attorney at law admitted to practice in the States of Michigan and Arizona; the United States

District Courts for the Eastern and Western Districts of Michigan; the United States Courts of Appeals for the Fourth, Sixth, Seventh and Ninth Circuits; and the Supreme Court of the United States.

2. I was graduated, *cum laude*, from Thomas M. Cooley Law School in 1984. I was admitted to practice law in the State of Michigan in 1984, and in the State of Arizona in 1985.

3. Currently, I am the senior partner and principal owner of the law firm of Shafer & Associates, P.C. For the past ten years, my law practice has primarily consisted of state and federal court litigation in the areas of constitutional law, civil liberties, and civil rights. I have actually practiced in these areas, however, for the entirety of my legal career of almost 15 years, as well as during two years of law clerking. Within these areas, my specialty has been First Amendment rights as it pertains to adult entertainment. I have tried numerous cases in both state and federal courts in these areas, and have extensive appellate experience concerning these constitutional issues. I was counsel for three of the respondents in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and currently have a petition for a writ of certiorari pending arising out of another case from this Court. I am currently vice-president, and president-elect, of the First Amendment Lawyers Association; a national bar association of attorneys who specialize in First Amendment litigation. H. Louis Sirkin, counsel for the Pendergrass Plaintiffs here, was a previous president of the First Amendment Lawyers Association.

4. I have received admission to appear as counsel pro hac vice in constitutional litigation matters in various federal district courts, including those for the Western

District of North Carolina, Charlotte Division; the Western District of Tennessee; the Western District of Washington; the Southern District of Iowa; the Middle District of Tennessee; the Middle District of Florida, Ft. Myers Division; the Southern District of Indiana; and the Northern District of Indiana.

5. In addition, I have also received permission to appear as counsel pro hac vice in various state trial and appellate courts, in such states as Washington, Ohio, Texas, Indiana, Missouri, California, North Carolina, Massachusetts, Minnesota, New Jersey, Iowa, and Florida.

6. I practice First Amendment law on a national basis, and my standard rate for hourly clients in First Amendment litigation matters wherever I practice is $175.00 per hour. This is actually a low hourly rate. I am personally aware that other similarly qualified First Amendment attorneys are regularly compensated at hourly rates from between $200.00 to $375.00 per hour.

7. I have litigated cases previously both in this Court and in the United States District Court for the Western District of Tennessee. I have become familiar with what similarly experienced First Amendment attorneys charge in Nashville and throughout the State of Tennessee, such as my co-counsel, Michael Pleasants, and $175.00 per hour is a reasonable prevailing market rate in this community.

8. The time sheets attached hereto as Ex. A are an accurate representation of the services performed by my firm on behalf of the Plaintiffs in this case. The records are kept contemporaneously with the services that have been performed. The matters that have been redacted from the bills are matters that I believe are inappropriate to claim as attorney fees at this stage of the proceeding in regard to

an interim request. By deleting these charges, Plaintiffs do not waive any claim of entitlement to reimbursement for them at a later time. When I have redacted out hours expended, I have reduced commensurately the hours charged by designating the redacted time with the notation of "n/c" standing for "no charge." The same designation applies for time which I have simply exercised billing judgment by not charging, although no corollary billing entries are redacted.

9. In addition, attached hereto as Ex. B is a ledger of the out-of-pocket expenses and costs that my clients incurred in regard to the legal representation that my firm has afforded to them. These costs and expenses were actually incurred, actually billed to the clients, actually paid by the clients, were necessarily incurred, and are reasonable. Ex. B references law clerk expenses for legal research. Consistent with my fee agreement with my clients, law clerk time is billed at $17.00 per hour, and is reflected as a cost on Ex. B as opposed to itemized legal time on Ex. A. The law clerk rate of $17.00 per hour is far below the normal rates that law firms charge clients, which is usually billed at the rate of $40.00 per hour or more.

10. The attached billings reflect time expended by five attorneys who either worked in, for, or on behalf of my office in this matter. The bills designate them by initials, and these people are identified as follows:

Initials	Name	Hourly Rate
BJS	Bradley J. Shafer	$ 175.00 per hour
SMG	Scott M. Goldstein	$ 125.00 per hour
AKW	Andrew K. Wilkins	$ 125.00 per hour
ASR	Allan S. Rubin	$ 150.00 per hour
AIB	Amy Burgess	$ 125.00 per hour

The hourly rates ascribed to each one of these attorneys is commensurate with their skill level.

11. Billing judgment was exercised at the time the work was originally entered so that not all time for a particular service was recorded as a billable charge. While all time expended by the attorneys in my office for legal work on this case has been recorded, I have exercised billing judgment in not specifically charging all of that time, particularly concerning the significant research that was necessary in order to litigate both the first and second motions for preliminary injunction.

12. All four groups of Plaintiffs' attorneys coordinated in the handling of this litigation in order to ensure that there was either no or minimal duplication of effort. While we have shared briefing tasks, my office has been primarily responsible for acting as lead counsel on this case and has been responsible for a majority portion of briefing. Accordingly, that is why the bills from my office are substantially greater than the other attorneys involved.

13. The total number of hours expended by the plaintiffs' attorneys in this case is reasonable, and reflect the fact that this was (and is) a complicated and difficult case involving many different areas of constitutional and First Amendment law. They also reflect that this case has progressed over a period of over 2 ½ years, during which time the Defendants have vigorously contested and opposed all of the plaintiffs' claims of unconstitutionality, in spite of the fact that the Defendants later made almost 100 amendments to cure constitutional deficiencies in the ordinance as either pointed out by this Court in its Order granting the first motion for preliminary injunction, or as

pointed out by the Plaintiffs' in their comprehensive and extensive second motion for preliminary injunction.

14. The total number of hours expended by my firm prior to the filing of the initial complaint and the first motion for preliminary injunction are large for two reasons. First, my firm was retained in this matter before Ch. 6.54 was even enacted. Accordingly, we began research and briefing when the first version of the ordinance was proposed. Additional research, briefing, and revisions to briefing, was necessary when various amendments were added to the Bill before it was ultimately enacted as Ch. 6.54. In addition, because we were not certain as to how quickly the ordinance would take effect after it was enacted, and we therefore did not know how long we had to prepare a lawsuit, have it filed, and have a preliminary injunction motion ruled upon before the ordinance became effective, we were required to be prepared with pleadings long before the ordinance was enacted. Second, Ch. 6.54 is an extremely comprehensive, detailed, and lengthy ordinance that required new research and briefing on a wide-range of constitutional issues. Plaintiffs were intending to brief all of the various constitutional challenges in the first motion for preliminary injunction until Plaintiffs' counsel received correspondence from Shayna Abrams, one of the defense attorneys in this litigation, stating that compliance with the non-licensing provisions of Ch. 6.54 did not have to occur until a business actually obtained a license. Accordingly, if the licensing provisions were unconstitutional (which turned out to be the case because of the lack of prompt judicial review and the failure to maintain the status quo during appellate remedies), there was no need to challenge the non-licensing provisions of the ordinance at that time. As a result of receiving the correspondence

from Ms. Abrams, we deleted in our briefing on the first preliminary injunction motion all constitutional challenges to the non-licensing provisions of Ch. 6.54. Those arguments were, however, ultimately finished, appropriately fully briefed, and then incorporated into the second motion for preliminary injunction.

15. On January 27, 1999, the Honorable Aleta A. Trauger, the District Court Judge assigned to this case at that time, conducted a hearing which was to be on Plaintiffs' second motion for preliminary injunction. That hearing never occurred as after some initial comments by counsels, Judge Trauger recused herself from all further proceedings in this matter. However, prior to the commencement of the hearing, I handed defense counsels two affidavits which I had intended to file under seal that day. Those affidavits are attached hereto as Ex. C, and outline the experiences of two entertainers who attempted to undergo fingerprinting for the permitting process of Ch. 6.54. Because Judge Trauger recused herself and did not entertain argument on the preliminary injunction motion, I never actually filed those affidavits with this Court. However, the amendments to Ch. 6.54 which were enacted after the aborted hearing on January 27, 1999, contained specific revisions to the fingerprinting process so as to deal with the concerns outlined in the two affidavits.

FURTHER AFFIANT SAITH NOT.

Dated: June 14th, 1999 /s/ Bradley J. Shafer
Bradley J. Shafer

Subscribed and sworn to before me by Bradley J. Shafer, on this 14th day of June, 1999.

/s/ Danielle S. Stewart
Danielle S. Stewart,
Notary Public
Shiawassee County,
Acting In
Clinton County, Michigan
My Commission Expires:
June 27, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. a Tennessee Corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation, THE PLEASURE PALACE, INC. a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZABETH MARTZ, individually,	)	
Plaintiffs,	)	No. 3-97-1066
v.	)	Judge Higgins
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department	)	
Defendants,	)	
v.		Consolidated Cases
JERRY C. PENDERGRASS, et al.,	)	
Plaintiffs,	)	
v.	)	No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	Judge Higgins
Defendants.	)	

AFFIDAVIT OF MICHAEL F. PLEASANTS IN SUPPORT OF APPLICATION FOR ATTORNEY'S FEES

STATE OF TENNESSEE

COUNTY OF SHELBY

COMES NOW the Affiant, Michael F. Pleasants, and having been duly sworn, deposes and says as follows:

I am a licensed attorney in the State of Tennessee and have been practicing as such since 1967. I have also been admitted to the practice before the U.S. District Court for the Western and Middle Districts of Tennessee. I am co-counsel, along with Mr. Bradley J. Shafer of the Michigan Bar for Deja Vu of Nashville, Inc., and the other Plaintiffs in the above entitled case. I, Mr. Shafer and our associate attorneys have made every effort to avoid redundancy or duplication of services in the representation of our clients. Mr. Shafer and his staff have prepared the bulk of the pleadings and memoranda filed in this case, though frequently, I reviewed them prior to filing and made suggestions for their improvement. I and my associate, attorney David Lumb, were primarily responsible for researching and drafting matters which particularly dealt with Tennessee Law, i.e. the scope of review afforded by the Writ of Certiorari and Supersedeas, supposedly available to persons dis-satisfied with an action of the Davidson County Metropolitan Board of Sexually Oriented Businesses.

Some apparent duplication of time exists with respect to depositions of the Metro Davidson County Officials and necessary Court appearances. The scope of the Metropolitan Ordinance complained of in the instant lawsuit is very

broad and Mr. Shafer and I worked together in preparation for such depositions and in taking them. While Mr. Shafer was the interrogator in most of the depositions, I assisted him in preparation and in prompting him for area of questioning and documentation, as he did for me in the Depositions in which I was the interrogator. This contributed to the efficient conduct of these depositions.

Also, in joint appearances at Court sessions, most particularly, the hearing on Plaintiff's Second Motion for Preliminary Injunction, we divided the preparation and taking of testimony from witnesses in order to more efficiently utilize the Court's time. This operated to the benefit of Metropolitan Government by not unduly prolonging the hearing, which otherwise might have resulted.

Mr. David Lumb, an attorney in my office who performed certain research under my supervision, has been practicing since 1987 in the State of Tennessee. Mr. Lumb's time was billed on this matter at the rate of $150.00 (One Hundred Fifty Dollars and no/100) per hour and mine was billed at the rate of $175.00 (One Hundred Seventy Five Dollars and no/100). I have had extensive experience in matters involving First Amendment Law application and litigation since the early 1970's in Federal and State Courts in Tennessee and elsewhere. I am familiar with the prevailing rates for attorney's fees with like experience in the Nashville market area, and the rates of $175.00 for my time and $150.00 for Mr. Lumb's time are at or below current market rates.

Additionally, I am very familiar with the work and legal experience of Mr. Bradley J. Shafer, and have worked with him on this litigation, other litigation in the middle District of Tennessee, as well in the Western District of

Tennessee. He is extremely well versed in First Amendment matters. It is my understanding that he is requesting compensation in the Application for Attorney's Fees, for which this Affidavit is submitted in support at the rate of $175.00 per hour. I believe that this hourly rate is well within the prevailing rates for attorney's fees of like experience in the Nashville market area and is probably below the current market rates in either Memphis or Nashville, Tennessee.

I believe that the rates requested for all the attorneys mentioned in my Affidavit are in accord with rates prevailing in the Nashville market and that the hourly rates requested by me, Mr. Lumb and Mr. Shafer in this cause are at the low end of the scale in the community for Nashville attorneys of like experience and ability.

Copies of the detailed billings for time spent on this case from June 19, 1997 until February 24, 1999 and expenses incurred or advanced are attached hereto and incorporated herein as collective Exhibit "A".

The fee for my services, and that of Mr. Graves and Mr. Lumb have been calculated through February 24, 1999. Time after that date was spent in matters related to the case for which no fees are claimed at this time. My time records reflect that I devoted a total of 158.2 hours through February 24, 1999 at the rate of $175.00 per hour, for a total of $27,685.00. Mr. Frierson M. Graves' time spent was 9.25 hours in preparation of the Complaint and advice regarding it's format. At his rate of $175.00 per hour, the total of his fees is $1,618.75. Mr. David Lumb spent a total of 15.7 hours almost entirely in research on the Tennessee Certiorari issue and in drafting of the

Memorandum regarding this issue. At the rate of $150.00 per hour, the amount for his time is $2,355.00.

The expenses billed for which reimbursement is sought total $2,862.88.

In the billing of November 12, 1997, expenses charged for filing fees, service of process fees, copying, travel and shipping charges, totaling $511.61, expenses billed on December 10, 1997, were for travel, postage and shipping and totaled $357.85. The expenses billed on March 20, 1998, were for shipping and travel/lodging expense totaling $420.99. The billing of June 22, 1998, includes telephone charges, postage and shipping totaling $161.25. The billing of October 15, 1998, include shipping and telephone charges for a total of $261.02. The billing of January 6, 1999, includes travel, lodging, telephone and shipping, totaling $1,280.16. No expenses are claimed in the fee application for the statement of May 10, 1999.

The billings attached as collective Exhibit "A" accurately reflect the time and nature of the services performed, and all directly relate to prosecution of the lawsuit resulting in the modifications to the Ordinance made by Nashville, Davidson County Metropolitan Government. The total of legal fees described in collective Exhibit "A" is $31,658.75 for a total of fees and expenses of $34,521.63.

AND FURTHER AFFIANT SAYETH NOT.

/s/ Michael F. Pleasants
Michael F. Pleasants

SWORN TO AND SUBSCRIBED before me this 14th day of June, 1999.

/s/ Susan Michelle Walker
NOTARY PUBLIC

My Commission expires:
My Commission Expires Apr. 12, 2003 [SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*,	
Plaintiffs,	Case No. 3-97-1066
v.	Judge Higgins
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity,	
Defendants.	
	Consolidated Cases
JERRY C. PENDERGRASS, *et al.*,	
Plaintiff,	No. 3-97-1176
v.	Judge Higgins
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	
Defendant.	

DEFENDANTS' MEMORANDUM OF LAW
IN RESPONSE TO PLAINTIFFS' BRIEF
FOR ATTORNEYS' FEES

(Filed Aug. 16, 1999)

Interim attorneys' fees are not regularly awarded unless there has been an entry of any order that determines

substantial rights of the parties. In this case the only such order is the granting of the plaintiffs' first motion for a preliminary injunction which occurred December 3, 1997. Any fees and costs accrued after this date cannot be recovered because they have not resulted in an order determining the substantial rights of the parties. Even assuming the catalyst rule applies to a request for interim fees, the plaintiffs cannot use the catalyst rule unless they have prevailed on any significant issue in this litigation either through court order, settlement or through changing the behavior or policies of the defendants in a way which benefits the

* * *

inspection argument is within the pages discussing collateral estoppel an issue this Court has not yet ruled on, and eleven (11) pages discuss the still contended issue of live performances in booths. Not including the yet undecided booth or collateral estoppel issues, plaintiffs used eighteen and one-half (18½) pages of the one hundred and seventy-two page (172) brief to discuss issues on which they claim to have been successful. This represents only ten percent (10%) of the brief and any fees awarded should reflect that percentage.

CONCLUSION

If the Court determines that plaintiffs request for interim attorneys fees was timely, they are certainly the prevailing party as to the grant of plaintiffs' motion for a preliminary injunction, and as to that injunction, plaintiffs are entitled to $72,105.23 (Mr. Shafer – $58,550.77, Mr. Pleasants – $10,966.96, Mr. Sirkin – $2,587.50) in interim attorneys' fees. The Court should not address the remainder

of plaintiffs interim attorneys' fees request because they will not be ripe until the Court has ruled on the plaintiffs' second motion for a preliminary injunction. If the Court were to address these later issues now under the catalyst rule Mr. Shafer might, at most, be entitled to an additional $3,182.08 in interim attorneys' fees. The Defendants argue that it is improper to award any of the later fees until the Second Motion for a Preliminary Injunction is decided.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND
DAVIDSON COUNTY
JAMES L. MURPHY III,
9589, DIRECTOR OF LAW

/s/ James L. Charles
James L. Charles # 9007
Associate Director of Law

/s/ Francis H. Young by JLC
Francis H. Young # 16554
Metropolitan Attorney

/s/ Shayna Abrams
Shayna Abrams # 16702
Metropolitan Attorney
204 Metropolitan Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent via U.S. Mail to John Herbison, 2016 Eighth Avenue South,

Nashville, Tennessee 37204, H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906, this 16th day of August, 1999.

/s/ Shayna Abrams
Shayna Abrams

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE INC., et al.,	
Plaintiffs,	
vs.	Civil No. 3:97-1066
THE METROPOLITAN GOVERNMENT, et al.,	Judge Higgins Magistrate Judge Griffin
Defendants.	
and	
JERRY C. PENDERGRASS, et al.,	(consolidated cases)
Plaintiffs,	
vs.	Civil No. 3:97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	Judge Higgins Magistrate Judge Griffin
Defendant.	

AFFIDAVIT OF JOHN E. HERBISON IN SUPPORT OF CO-COUNSEL'S REQUEST FOR ATTORNEYS' FEES

State of Tennessee)
County of Davidson)

JOHN E. HERBISON, being duly sworn according to law, makes oath as follows:

1) I am an attorney licensed to practice law by the State of Tennessee since 1987. I am a member in good standing of the bar of this Court, the Supreme Court of Tennessee, the United States Court of Appeals, Sixth Circuit, and the United States Supreme Court.

2) Along with H. Louis Sirkin of the Ohio bar, I represent the Plaintiffs before this Court in the *Pendergrass* matter, that is, Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

3) Since approximately 1988 I have been continuously retained by Mr. Pendergrass individually in regard to representation of adult entertainment businesses with which Mr. Pendergrass is associated. I have been continuously retained by The 822 corporation since that business was incorporated in 1992. My participation in the instant lawsuit is pursuant to these retainer agreements.

4) My fee arrangements with Mr. Pendergrass and The 822 Corporation for professional services include the regular payment of a monthly, flat fee. I have accordingly not billed my clients by the hour for my time in the instant lawsuit, and, because I have not kept contemporaneous time records I have elected not to submit a request for an award of interim fees in this matter.

5) The substantive work which I have done on this lawsuit, *e.g.*, legal research, drafting pleadings and motions, appearing in court, participating in discovery, etc., has been performed pursuant to the above-described retainer. As the only Plaintiffs' attorney in this action based in Nashville, however, I have performed services benefitting all of the Plaintiffs in the consolidated cases, for example, filing certain documents, serving documents on opposing counsel, procuring and serving subpoenas,

coordinating scheduling of telephone conferences, etc. To the extent that these services have benefitted parties other than those by whom I am retained, I have not charged these parties for my time. It is my opinion and belief that my attending to these logistical matters has reduced the number of hours which would otherwise have been expended by co-counsel for the *Pendergrass* Plaintiffs and both counsel for the *Deja Vu* Plaintiffs, for which these counsel likely would have billed and sought a greater amount of fees under 42 U.S.C. § 1988 had I not performed such services.

FURTHER THE AFFIANT SAITH NOT.

/s/ John E. Herbison
JOHN E. HERBISON

Sworn to and subscribed before me this 21st day of January, 2000.

/s/ Lisa A. [Illegible] My Commission expires: 09/28/02
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	No. 3-97-1066 Judge Higgins Magistrate Judge Griffin
JERRY C. PENDERGRASS, et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Defendants.	Consolidated Cases No. 3-97-1176 Judge Higgins Magistrate Judge Griffin

PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S OCTOBER 1, 2002 REPORT AND RECOMMENDATION

(Filed Oct. 17, 2002)

Pursuant to Local Rule 302(e), Plaintiffs hereby give notice of their objections to the Report and Recommendation of the Magistrate Judge, which was filed in this matter on

October 1, 2002. The objections are based on the following grounds:

1. The Magistrate Judge used some incorrect figures initially supplied by the Plaintiffs, and not the later corrected version of those figures.

2. The Magistrate Judge did not grant the prevailing party Plaintiffs a total and complete recovery of their reasonable attorney fees and costs.

3. The Magistrate Judge incorrectly interpreted a recent Supreme Court decision to deny the Plaintiffs' request for attorney fees for all work done on ordinance provisions that were later amended by the Defendant.

4. The Magistrate Judge incorrectly denied, without prejudice, all of the claimed costs and expenses submitted by the Plaintiffs.

5. These objections are supported by the attached Memorandum of Law.

Dated: October 16, 2002. /s/ Andrew Wilkins

Bradley J. Shafer, MI P36604*
Andrew K. Wilkins, MI P-56559*
Shafer & Associates, P.C.
Counsel for "Deja Vu" Plaintiff
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
517-886-6560 – Telephone
*Admitted as counsel pro hac vice

Dated: October 16, 2002. /s/ Lou Sirkin by AKW

H. Louis Sirkin (w/permission)
Counsel for "Pendergrass"
Plaintiffs
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2776

Michael F. Pleasants
Co-Counsel for "Deja Vu" and
"Pendergrass" Plaintiffs
8 South Third, Suite 200
Memphis, Tennessee 38103

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity, Defendants.	No. 3-97-1066 Judge Campbell Magistrate Judge Griffin
JERRY C. PENDERGRASS, *et al.*, Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant.	Consolidated Cases No. 3-97-1176 Judge Campbell Magistrate Judge Griffin

DEFENDANTS' OBJECTION TO THE REPORT AND RECOMMENDATION (DOCKET NO. 265)

(Filed Nov. 8, 2002)

Defendants respectfully object to the Report and Recommendation issued by U.S. Magistrate Judge Juliet Griffin regarding plaintiffs' request for attorney's fees.

1. As to the second injunction, plaintiffs are only nominally "prevailing parties," so an additional downward adjustment of attorneys fees is appropriate.

Defendants respectfully suggest that the key point in determining an appropriate amount of attorney's fees is the fact that this litigation is easily separable into two distinct parts: the grant of the first preliminary injunction, its dissolution and the appeal thereof; and the grant of the second preliminary injunction, which was made final, and its subsequent appeal. The issues raised in plaintiffs' two injunction motions are entirely distinct. The first injunction motion was based on the alleged lack of "prompt judicial review" procedures in the Metropolitan Government's sexually oriented business ordinance. However, the second injunction motion contained a panoply of arguments, all of which were ultimately found to have no merit on appeal, except for the Sixth Circuit's finding that the term "sexually-oriented" was unconstitutionally overbroad. Even though the Sixth Circuit found this term overbroad, the court also found that the term could be easily severed from the ordinance without affecting the licensing scheme. *Déjà Vu of Nashville. Inc. v. Metropolitan Government*, 274 F.3d 377, 389 (6th Cir. 2001)

As to the appeal of the dissolution of the first injunction – the "prompt judicial review" appeal – Judge Griffin found that defendants owe plaintiffs $72,105.23 in their first application for fees and an additional $19,152.50 in their third application for fees. (Report and Recommendation, Docket No. 265, at 15 & 24-25). Defendants do not contest these amounts.

However, the issue is less clear regarding the remainder of plaintiffs' attorneys' billings, since the ultimate resolution of the rest of the case was favorable to plaintiffs only in a nominal, or technical sense. The bottom line is after raising literally dozens of challenges to the ordinance, and litigating them all the way to the Sixth Circuit, plaintiffs emerged with a finding that the term "sexually-oriented" (which appears in the definitional section of the ordinance only, and not as a stand-alone term in the text of the ordinance itself), was unconstitutional. The crux of the problem regarding the bulk of plaintiffs' attorneys' fees is that plaintiffs are asking the Court to reward them handsomely for a tremendous quantity of work which resulted in virtually no success for them.

The U.S. Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) indicated there should be a "generous threshold" for prevailing party status, with prevailing parties defined as those who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Since that time, however, the Supreme Court has reexamined its definition of a "prevailing party" on several occasions. As a result, the "threshold" for prevailing party status is no longer quite so generous, and plaintiffs fail to qualify as "prevailing parties" under that less generous definition.

Five years after the *Hensley* decision, the Court reversed an award of attorney's fees that was premised solely on a declaratory judgment that prison officials had violated the plaintiff's First and Fourteenth Amendment rights. *Rhodes v. Stewart,* 488 U.S. 1 (1988) (per curiam). In so ruling, the Court held that "nothing in [its prior holdings] suggested that the entry of [a declaratory] judgment in a party's favor automatically renders that party prevailing under § 1988." *Id.* at 3. The Court went on to hold that a judgment – declaratory or otherwise – "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Id.* at 4. Accordingly, even though the *Rhodes* plaintiffs had obtained a declaratory judgment against the defendant prison officials, they were not prevailing parties, because the Court's judgment did not affect how prison officials actually treated them.

In the years following the *Rhodes* decision, the Supreme Court continued to emphasize the need for a plaintiff asserting prevailing party status to "point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Assn. v. Garland Independent School Dist,* 489 U.S. 782, 792 (1989). In doing so, the Court clarified that the "touchstone of the prevailing party inquiry [was] the material alteration of the legal relationship between the parties." *Id.* Then, in 1992, the Court redefined the nature of the "success" necessary for a party to obtain prevailing party status, holding that to achieve such status, a plaintiff "must obtain an enforceable judgment against the defendant from whom fees are sought . . . that directly benefit[s] him at the time of the judgment or settlement." *Farrar v. Hobby,* 506 U.S. 103, 111 (1992). In *Farrar,* the

Court held that "[i]n short, a plaintiff 'prevails' 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Based upon this new, "synthesized" understanding of who qualifies as a "prevailing party," the Court in *Farrar* went on to find that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* However, the Court also observed that:

> [t]o be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

506 U.S. at 112-13.

Applying this language to the present case, as to the second injunction in its entirety plaintiffs do not meet the criteria of "prevailing parties." As to that entire motion, plaintiffs succeeded in obtaining a ruling that the term "sexually oriented" violated the Constitution, yet the Sixth Circuit found that it could be easily severed from the ordinance without having any impact on the licensing scheme. *Déjà vu* at 389.

Defendants respectfully submit that the rationale of *Farrar* applies to the present case. Plaintiffs' success in

having the Sixth Circuit find a single term in the ordinance unconstitutionally overbroad but then finding that it could be easily severed is, at most, a *de minimus* or technical victory. In the face of such limited success, the Court should "engage in a measured exercise of discretion" when deciding what amount of attorney's fees is appropriate. *Farrar* at 114. The Court should consider the net effect of plaintiffs' efforts in pursuing the second injunction and the subsequent appeal resulting therefrom, in determining a reasonable fee based thereon. In fact, considering plaintiffs' nominal success in the bulk of the litigation, the Court may award a low fee without performing the 12-factor reasonableness analysis set forth in *Hensley*. *Farrar*, at 115; *Id.* at 117-118 (O'Conner J. concurring).

Defendants respectfully submit that while Judge Griffin was on the right track, she simply did no go far enough. By defendants' count, Judge Griffin disallowed $133,376.59 of plaintiffs' total attorney's fees. Clearly, Judge Griffin was trying to award plaintiffs a fee based on the degree of success obtained while not awarding fees for work performed on easily severable matters upon which the plaintiffs did not prevail. Judge Griffin's recommended reduction in the fees sought is significant. However, it should go further.

Under *Farrar*, defendants ask the Court to make an additional reduction in the amount of fees to reflect the fact that plaintiffs' ultimate success on all the issues raised in their second injunction motion was minimal. When the $133,376.59 disallowed by Judge Griffin is subtracted from the $569,184.66 plaintiffs requested in their first three fee applications, the resulting award of fees is $435,808.07. Defendants respectfully suggest a more significant reduction is appropriate in light of plaintiffs'

negligible success in litigating the issues raised in the second injunction motion. One only has to consider the sheer volume of paper consumed by the second preliminary injunction filing itself to realize that the briefing of the issues raised therein constituted the lion's share of this litigation.

Defendants do not contest the $72,105.23 in the first fee application incurred in litigating the first injunction motion, nor the $19,152.50 in the third fee application incurred in the appeal of the dissolution of the first injunction. These amounts total $91,257.73. Defendants suggest that a figure closer to this one, and significantly less than the $435,808.07 awarded by Judge Griffin, would be appropriate.

Out of 43 issues plaintiffs raised in their second injunction motion, they prevailed at the trial court level on 4 of them. *See* defendants' response to plaintiffs' second fee request at 1-2, n. 2, Docket no. 215. Of the 17 issues raised by all plaintiffs combined in their briefs on the appeal of the second injunction, the only issue on which they succeeded at the Sixth Circuit was on the overbreadth of the term "sexually oriented."

Thus, when the $91,257.73 relating to the first injunction and the appeal thereof (which defendants concede is owed) is subtracted from the $435,808.07 awarded by Judge Griffin, the balance is $344,550.34. As to these fees, the bulk of which were incurred in litigating the second injunction at the trial and appellate levels, the Court should engage in a "measured exercise of discretion" to reflect plaintiffs' limited degree of success. Defendants submit it is reasonable to reduce this figure by two-thirds, like Judge Griffin did for all work performed after April 3,

2000. The resulting amount of $114,850.11, although generous to plaintiffs, should then be added to the $91,257.73 which defendants concede is owed, for a total fee award of $206,107.84.

2. The demise of the "catalyst rule."

In their objections to Judge Griffin's Report and Recommendation, plaintiffs expend considerable effort in an attempt to convince the Court that the "catalyst rule" is still a valid theory under which to award attorneys fees. However, such is not the case. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services,* 532 U.S. 598 (2001), the United States Supreme Court determined that the fee-shifting provisions of 42 U.S.C. § 1988 should not be used to award attorney fees based on the catalyst theory. In *Buckhannon,* writing for the majority, Justice Rehnquist defines a prevailing party as, "one who has been awarded some relief by the court." *Id.* at 602. Furthermore, the Court clearly states that a judgment by the court must be awarded, changing the legal relationship of the parties, for a party to be considered a "prevailing party" with regards to the fee-shifting provisions of § 1988. *Id.*

In *Chambers v. Ohio Dept. of Human Services,* 273 F.3d 690 (6th Cir. 2001), the Sixth Circuit reviews the history of the "catalyst theory" and the impact of the *Buckhannon* decision, ultimately concluding that "The Supreme Court's recent opinion in *Buckhannon* . . . has made clear that to 'prevail' the party must have obtained a change in the legal relationship of the parties that originated in a court order or that had at least received judicial sanction. The catalyst theory of success thus is no longer a

permissible basis for awarding attorneys fees." *Chambers*, at 691.

The "catalyst rule" is no longer available to the plaintiffs.

In the Report and Recommendation, Judge Griffin cites to *Buckhannon*, and she correctly holds that plaintiffs may not recover fees for work which plaintiffs contend was merely the "catalyst" for amendments to the ordinance. Report, at 13-14. Despite plaintiffs' protestations to the contrary, Judge Griffin followed *Buckhannon* and she properly attempted to exclude work which did not lead to court-ordered relief. The fact that the catalyst rule may have been a viable theory when plaintiffs made their initial application for fees is beside the point. It is no longer the law in Section 1983 cases, and Judge Griffin properly attempted to exclude fees for work which plaintiffs merely allege was the "catalyst" for amendments to the ordinance. Defendants respectfully submit that Judge Griffin simply did not go far enough in disallowing fees which are no longer recoverable under the catalyst rule.

3. Plaintiffs' first and second requests for fees.

In their objections, plaintiffs take issue with Judge Griffin' methodology through which she separated out billings for work performed on aspects of the case in which plaintiffs clearly did not prevail. Plaintiffs reiterate their contention that all the work in the case was so intertwined that it is impossible to separate it into allowable and disallowable components. Plaintiffs seem to complain that they are being penalized for providing some billing records which identify with some specificity the actual work performed. Plaintiffs appear to argue that if they had

submitted more vague and indescriptive billing records, then Judge Griffin would not have been able to weed out the work which did not result in any court-ordered relief. As a result, plaintiffs seem to contend that Judge Griffin would have recommended awarding a higher fee.

This argument overlook the basic function of submitting billing records. The records have to be sufficiently detailed to allow the Court to ascertain the nature of the work, in order to determine if the particular work led to a successful result. Hypothetically speaking, if billing records are intentionally vague, in an effort to stymie the Court in its attempt to fairly award fees, plaintiffs should be penalized, not rewarded. If the Court can't tell the issues upon which work was done in a given time entry, the Court should disallow the entry, not give plaintiff the benefit of the doubt.

Judge Griffin obviously spent a great deal of time and effort in reviewing all plaintiffs' counsels' time entries, and she weeded out the ones which were obviously not related to claims upon which plaintiffs succeeded. However, as set forth above, an additional reduction is appropriate, since Judge Griffin obviously resolved many questionable entries in plaintiffs' favor.

4. Plaintiffs' third request for fees.

In their objections, plaintiffs complain that Judge Griffin disallowed two-thirds of their requested fees in their third request for fees. However, defendants submit that Judge Griffin performed exactly the type of analysis contemplated in *Hensley, supra*.

The initial oral argument before the Sixth Circuit on the "prompt judicial review" appeal was held on March 6, 2000.[1] After allowing fees for some follow-up work apparently related to the first appeal, Judge Griffin then disallowed two-thirds of the fees generated after April 3, 2000, the vast majority of which related to the appeal of the second injunction, which is the injunction that plaintiffs had so little success defending in the Sixth Circuit.

Judge Griffin's disallowance of two-thirds of the fees generated after the first appeal was a common-sense attempt to award a reasonable fee relative to the degree of success plaintiffs obtained in their appeal of the second injunction. Defendants invite the Court to consider that plaintiffs actually appealed the grant of the second injunction – which they sought in the first place – presumably because they were not happy with Judge Higgins' stated reasons in entering that injunction. A significant (yet unquantifiable) amount of attorneys' fees related to the appeal of the second injunction were incurred as a result of plaintiffs' appealing an injunction **entered in their favor!** Surely the Court may take cognizance of that fact in making a significant percentage reduction of the amount of fees generated by plaintiffs' in that appeal.

Discounting two-thirds of the fees related to the appeal of the second injunction is actually a generous apportionment in plaintiff's favor. Despite raising dozens of claims of alleged constitutional infirmity they only

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[1] However, at oral argument the Court indicated it was going to consolidate that appeal with the recently filed appeals concerning the second injunction. Thus, substantive argument on the first appeal was reserved until all the appeals were argued together on January 24, 2001.

succeeded at the Sixth Circuit in obtaining a ruling that "sexually oriented" is unconstitutionally overbroad, but that the term could easily be severed without affecting the licensing scheme. When compared to the total amount of time, expense and paper consumed in litigating the second injunction, this "success" is *de minimus,* at best.

5. Plaintiffs' requests for costs and expenses.

Defendants object to plaintiffs' charges for UPS next day air, or Federal Express shipping. As to the bulk of plaintiffs' charges for costs, it is impossible to identify what claims were supported by each individual cost, so that the Court can make a fair assessment of costs in the same manner as making an assessment regarding attorney fees. As such, plaintiffs' request for an award of costs should be discounted in the same percentage as the ultimate fee determination.

Adding the total costs for the first three fee requests from the summary pages of plaintiffs' brief in support of their refiled motion for costs results in a figure of $56,456.63. Discounting this figure by two-thirds results in a total costs award of $18,818.87.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY
KARL DEAN, #10419,
DIRECTOR OF LAW

/s/ James L. Charles FHY
James L. Charles, #9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young, #16554
Metropolitan Attorney
204 Metropolitan Courthouse
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent via U.S. Mail to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 8 of November, 2002.

/s/ Francis H. Young
Francis H. Young

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)
Plaintiffs,	)
v.	) No. 3-97-1066
	) Judge Campbell
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	) Magistrate Judge Griffin
Defendants.	)
	) Consolidated Cases
JERRY C. PENDERGRASS, et al.,	)
Plaintiffs,	)
v.	) No. 3-97-1176
	) Judge Campbell
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	) Magistrate Judge Griffin
Defendants.	)

STIPULATED NOTICE OF THE TOTAL ATTORNEY FEES "AWARDED" BY THE MAGISTRATE'S REPORT AND RECOMMENDATION (DOCKET NO. 265)

(Filed Feb. 7, 2003)

Pursuant to this Court's Order of December 6, 2002 (Docket No. 276), the parties to this action hereby provide notice to this Honorable Court that they stipulate that the

amount of attorney fees "awarded" by the Magistrate Judge in her Report and Recommendation of October 1, 2002 (Docket No. 265), as it relates to the Plaintiffs' first three motions for attorney fees and costs) is $431,099.56. This amount is to be allocated as follows: $367,080.37 to the law firm of Shafer & Associates, P.C., on behalf of the "Deja Vu" Plaintiffs; $10,928.36 to the law firm of Michael Pleasants, Esq., on behalf of the "Deja Vu" Plaintiffs; and $53,090.83 to the law firm of Sirkin, Pinales, Mezibov & Schwartz on behalf of the "Pendergrass" Plaintiffs.

This stipulation as to the amount of attorney fees awarded in the Report and Recommendation shall in no way be construed as a concession by any party to the correctness of either the Report and Recommendation (Docket No. 265) or the District Court's Order of December 6, 2002 (Docket No. 276).

/s/ Andrew Wilkins
ANDREW K. WILKINS
(P56559)*
Co-Counsel for
"Deja Vu" Plaintiffs
Dated: 2/6/03

/s/ Francis Young
FRANCIS H. YOUNG,
16554
Co-Counsel for Defendants
Dated: 2/6/03

/s/ Michael Pleasants
MICHAEL PLEASANTS
Co-Counsel for both the
"Deja Vu" and
"Pendergrass" Plaintiffs
Dated: 2/6/03

/s/ H. Louis Sirkin
H. LOUIS SIRKIN*
Co-Counsel for
"Pendergrass" Plaintiffs
Dated: 2/6/03

*Admitted Pro Hac Vice

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
TENNESSEE AT NASHVILLE

DEJA VU OF NASHVILLE INC., a Tennessee Corporation, *et al.*,	
Plaintiffs,	No. 3-97-1066
v.	Judge Campbell
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity,	Magistrate Judge Griffin
Defendants.	
JERRY C. PENDERGRASS, *et al.*,	Consolidated Cases
Plaintiff,	
v.	No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	Judge Campbell Magistrate Judge Griffin
Defendant.	

DEFENDANTS' OBJECTION TO THE REPORT AND RECOMMENDATION (DOCKET NO. 283)

Defendants respectfully object to the Report and Recommendation issued by U.S. Magistrate Judge Juliet Griffin regarding plaintiffs' fourth request for attorney's fees.

Defendants incorporate by reference the arguments made and authorities relied upon in their response to plaintiffs' fourth request for attorney's fees (Docket no. 263). In particular, defendants object to plaintiffs' being allowed to claim fees for their work on their second and third fee petitions, since the bulk of those fees were for work related to the second preliminary injunction, as to which plaintiffs were completely unsuccessful before the Sixth Circuit on all but one issue. These fees should be reduced by at least two-thirds.

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND
DAVIDSON COUNTY
KARL DEAN, #10419,
DIRECTOR OF LAW

/s/ James L. Charles
James L. Charles, #9007
Associate Director of Law

/s/ Francis H. Young
Francis H. Young, #16554
Metropolitan Attorney
204 Metropolitan Courthouse
Nashville, TN 37201
(615) 862-6341

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been sent via U.S. Mail to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis,

Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 30 of September, 2003.

/s/ Francis H. Young
Francis H. Young

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMETT TURNER, Chief of Police in his official capacity, Defendants.	No. 3-97-1066 Judge Campbell Magistrate Judge Griffin
JERRY C. PENDERGRASS, *et al.*, Plaintiff, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, Defendant	Consolidated Cases No. 3-97-1176 Judge Campbell Magistrate Judge Griffin

MOTION TO DISSOLVE THE INJUNCTION

The Metropolitan Government respectfully moves this Honorable Court to dissolve the permanent injunction entered in this case on December 23, 1999, enjoining it from enforcing Chapter 6.54 of the Metropolitan Code of Laws. Chapter 6.54 of the Metropolitan Code of Laws

(hereinafter, M.C.L.) regulated sexually oriented businesses through its licensing and permitting procedures. For grounds, the Metropolitan Government states:

1. The United States Court of Appeals held in this case that:

> Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected.

Déjà vu, Inc. v. The Metropolitan Government of Nashville and Davidson County, 274 F.3d 377, 403 (6th Cir. 2002).

2. Although the United States Supreme Court denied the Metropolitan Government's petition for certiorari, *The Metropolitan Government of Nashville and Davidson County v. Déjà vu of Nashville, Inc.*, 535 U.S. 1073, 122 S.Ct. 1952, 152 L.Ed. 2d 855 (May 13, 2002), in the later case *City of Littleton v. Z.J. Gifts*, 541 U.S. 774 (2004), the United States Supreme Court addressed the adequacy of judicial review procedures and specifically rejected the legal premises upon which the Sixth Circuit had concluded that Chapter 6.54 M.C.L. did not provide for prompt judicial review of the Metropolitan Government's Sexually Oriented Business Licensing Board's decisions.

3. T.C.A. Section 27-9-111(e) was amended to comply with the Sixth Circuit's requirements for guaranteeing prompt judicial review, even though it is now unnecessary.

4. The definition of the term "sexually oriented" has been amended to cure its overbreath.

5. Even if the definition of "sexually oriented" were still overly broad, the Court must then sever the offending term and dissolve the injunction, since the judicial review procedures are adequate.

While the Metro Nashville Government asks that this Court grant its motion to dissolve the injunction, it further request the Court to stay the effective date of its order for a period of ninety (90) days from the date of entry of its order. The stay would allow sexually oriented businesses and entertainers sufficient time to come back into compliance with the requirements of Chapter 6.54 M.C.L. Any sexually oriented business operating within the Metropolitan Government on the effective date of the Court's order will be an "existing sexually oriented business" for purposes of compliance with Chapter 6.54 M.C.L. Any entertainer performing sexually oriented entertainment in a sexually oriented business within the Metropolitan Government on the effective date of the Court's order will be a "current entertainer" for purposes of compliance with Chapter 6.54 M.C.L.

The following exhibit is submitted in support of the motion:

A. Chapter 6.54, Metropolitan Code of Laws (as currently amended).

Respectfully submitted,

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF
NASHVILLE AND
DAVIDSON COUNTY
KARL DEAN, # 10419
DIRECTOR OF LAW

/s/ James L. Charles
James L. Charles # 9007
Associate Director of Law
204 Metropolitan
Courthouse
Department of Law
Nashville, TN 37201
(615) 862-6341

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I certify that copies of the foregoing have been sent via U.S. Mail to H. Louis Sirkin, 920 Fourth & Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202-2776, Michael F. Pleasants, 8 South Third, Suite 200, Memphis, Tennessee 38103, and Bradley J. Shafer, 3800 Capital City Blvd., Suite 2, Lansing, Michigan 48906 this 25th of February, 2005.

/s/ James L. Charles
James L. Charles